# APPENDIX

## APPENDIX I

BOARD OF TRADE OF THE CITY OF CHICAGO
THE BOARD OF TRADE OF KANSAS CITY, MO
BUNGE CORPORATION
C-G-F GRAIN COMPANY, INC.
CALIFORNIA GRAIN AND FEED ASSOCIATION
CASH GRAIN ASSOCIATION OF THE CHICAGO BOARD OF TRADE
THE DENVER GRAIN EXCHANGE ASSOCIATION
ENID BOARD OF TRADE
FS SERVICES, INC.
FAR-MAR-CO., INC.
FORT WORTH GRAIN EXCHANGE
GARVEY ELEVATORS, INC.
GARVEY GRAIN, INC.
HOLLANDER & FEUERHAKEN
THE HUTCHINSON BOARD OF TRADE
KANSAS CITY GRAIN COMMISSION MEN'S ASSOCIATION
KANSAS GRAIN & FEED DEALERS ASSOCIATION
LINCOLN GRAIN, INC.
LOS ANGELES GRAIN EXCHANGE
MASTERS GRAIN COMPANY
MERCHANTS' EXCHANGE OF ST. LOUIS
MIDWESTERN GRAIN COMPANY — DIVISION OF GARNAC GRAIN CO., INC.
MISSOURI DEPARTMENT OF AGRICULTURE
MISSOURI FARMERS ASSOCIATION, INC.
MOHR-HOLSTEIN COMMISSION CO.
NATIONAL ASSOCIATION OF WHEAT GROWERS
NATIONAL GRAIN AND FEED ASSOCIATION
NATIONAL GRAIN TRADE COUNCIL
OMAHA GRAIN EXCHANGE
PACIFIC NORTHWEST GRAIN DEALERS ASSOCIATION, INC.

PEORIA BOARD OF TRADE
PRODUCERS GRAIN CORPORATION
ST. JOSEPH GRAIN EXCHANGE
SIOUX CITY GRAIN EXCHANGE
STATE CORPORATION COMMISSION OF THE STA
OF KANSAS
STOTLER & COMPANY
UTAH-IDAHO GRAIN EXCHANGE
THE WICHITA BOARD OF TRADE

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*Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (S.D. Calif. 1953) ..... 4

*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) ..... 5

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*Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954) ..... 6, 7

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*Wirthmore Feeds, Inc.* v. *Baltimore and Ohio Railroad Co.*, 221 F. Supp. 745 (W.D.N.Y. 1963) ..... 4

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

**Nos. 72-214 and 72-433**

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., and INTERSTATE COMMERCE COMMISSION,

*Appellants,*

vs.

THE WICHITA BOARD OF TRADE, et al., and SECRETARY OF AGRICULTURE,

*Appellees.*

**On Appeal From The United States District Court For The District of Kansas**

## REPLY TO MOTIONS TO AFFIRM

### I

Without any request by the appellees to grant such relief, without any discussion of its authority to do so, and without any findings to support an injunction, the District Court *sua sponte* ordered that the inspection charges (which had been in effect for over a year and had previously been suspended by the Commission for the maximum seven-month period) "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (App. C7).

Although they did not even see fit to request such relief below, appellees now attempt to reconcile the District Court's asserted power to suspend rates, pending reconsideration by the Commission on remand, with this Court's

clear holding in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963). Appellees contend that *Arrow* is inapplicable once the Commission has issued a decision in the § 15(7) proceeding—"after the primary jurisdiction of the Interstate Commerce Commission has been exhausted" (USDA Motion, p. 10).*

The proposed distinction, however, is patently without merit for two reasons: First, the *Arrow* decision is by no means limited to a "primary jurisdiction" test but instead rests on this Court's finding of a congressional intention, based on the statutory scheme and its legislative history, to exclude courts altogether from suspending rates. Second, appellees' argument is self-defeating; for, even assuming *arguendo* that *Arrow* were limited to a "primary jurisdiction" test, as appellees erroneously contend, the District Court's remand of the matter to the Commission "for further proceedings" would have the effect of reopening the § 15(7) proceeding and thereby reinstating the Commission's "primary jurisdiction."

1. Section 15(7) not only specifically limits the suspension period to a maximum of seven months but also expressly provides that "the proposed change of rate . . . shall go into effect at the end of such period."** In *Arrow*, in the

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* The motion to affirm filed by appellees The Wichita Board of Trade, et al., is referred to herein as "Wichita Motion, p. . . ." the motion to affirm filed by the Secretary of Agriculture is referred to as "USDA Motion, p. . . ."

** For the period thereafter, Congress provided two restitution remedies (in addition to judicial review of the Commission order): reparations under § 15(1), and accounting and refund under § 15(7). In this case, a similar accounting and refund procedure was ordered by this Court as part of its order staying the judgment below pending determination of the appeal. (App. F1-2.)

light of the statutory scheme and its legislative history, this Court unequivocally held that Congress "meant to *foreclose judicial power to extend that period*" (p. 664) and "to *vest in the Commission the sole and exclusive power to suspend* and to withdraw from the judiciary any pre-existing power to grant injunctive relief" (p. 667). (Emphasis added.) Similarly, the Court pointed out that ". . . [W]e cannot suppose that Congress, by vesting the new suspension power in the Commission, intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head. . . ." (p. 664), and that ". . . [I]t would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive . . . ." (p. 668).

Since the text of the *Arrow* decision is so fundamentally opposed to their proposed interpretation, appellees resort to a search among *Arrow* footnotes for support. (Wichita Motion, pp. 9-10; USDA Motion, p. 10.) Remarkably, they rely on footnote 22 (p. 671), referring to "decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." Such decisions have no application to the District Court's decision in this case, which suspended rates that had been in effect over a year, while simultaneously remanding the "matter" to the Commission "for further proceedings"; the injunction was not issued pending judicial review but instead *after* review, pending the remand to the Commission and possibly beyond. Furthermore, the footnote goes on to state that "Such power has been deemed merely incidental to the court's jurisdiction to review final agency action, *and has never been recognized in derogation of such a clear congressional purpose to oust judicial power*

*as that manifested in the Interstate Commerce Act.*"* (Emphasis added.)

As Chief Judge Friendly held in *National Small Shipments Traffic Conference, Inc.* v. *United States*, 321 F.Supp. 500, 515 (S.D.N.Y. 1970): "We see no relevant difference with respect to our power to [suspend rates] in the fact that the Commission here concluded its labors . . . ." In neither situation can a court extend or reinstitute a suspension which has already continued as long as Congress has provided in § 15(7). The broad scope of *Arrow* has been consistently recognized in subsequent reported decisions dealing with the issue. See *National Small Shipments Traffic Conference, Inc.* v. *United States, supra; Oscar Mayer & Co.* v. *United States*, 268 F.Supp. 977, 980 (W.D. Wis. 1967); *Wirthmore Feeds, Inc.* v. *Baltimore and Ohio Railroad Co.*, 221 F.Supp. 745 (W.D.N.Y. 1963); *Port of New York Authority* v. *United States*, 451 F.2d 783, 788 (2d Cir. 1971).**

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* See *Iowa City—Montezuma Railroad Ship. Ass'n* v. *United States*, 338 F.Supp. 1383, 1392 (S.D. Iowa 1972) (*Arrow* footnote 22 "not only provides no comfort for [plaintiff's] position, but appears to significantly undermine it").

** Appellees rely on three cases which they characterize as a "well-founded body of precedent" (Wichita Motion, pp. 10-11; see also USDA Motion, pp. 8-11). Two of the three were decided long before *Arrow*, and in any event did not even pass on the issue. *Inland Steel Co.* v. *United States*, 306 U.S. 153 (1939); *Cantlay & Tanzola, Inc.* v. *United States*, 115 F.Supp. 72 (S.D. Calif. 1953). In *Inland*, the injunction referred to in the opinion did not suspend rates but set aside an ICC order invalidating a tariff providing for a railroad's paying certain allowances; the effect of the court's order, by setting aside the ICC order, was to let the tariff continue in effect (306 U.S. at 155). In *Cantlay*, contrary to the misleading implication of the Wichita Motion (p. 11), the court (115 F.Supp. at 84) expressly declined to pass on the issue later decided in *Arrow*.

The third case relied on by appellees is an unreported order referred to in *Ad Hoc Committee on Consumer Protection* v. *United States*, 313 F.Supp. 119, 124 (D.D.C. 1970). The order, remanding

2. The strained interpretation of *Arrow* advanced by appellees is without support in the *Arrow* rationale, its language, even its footnotes. But, even assuming that there were any possible merit to such an interpretation, it would not help appellees in this case. Contrary to the premise of their argument, the District Court did not suspend the charges pending its review of the Commission's order, but instead suspended the charges *at the conclusion of the review proceeding* while simultaneously *remanding the "matter" to the Commission "for further proceedings."* Thus, the appellees' argument that courts may suspend "after the primary jurisdiction of the Interstate Commerce Commission has been exhausted" (USDA Motion, p. 10) has no application here since the decision they seek to have affirmed would return the case to the Commission's primary jurisdiction.

"[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). See also *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 145 (1940); *United States* v. *Saskatchewan Minerals*, 385 U.S. 94, 95 (1966). Furthermore, ". . . all matters of administrative discretion remain open for determination on remand after reversal . . . ." *Federal Communications Commission* v. *Pottsville Broadcasting Company, supra*, at 146.

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the case to the District Court from the Court of Appeals, was entered in emergency session by a two-judge panel, and merely concerned the possible issuance (later granted by the District Court) of a temporary restraining order of twelve days' duration pending immediate review of a Commission order by the District Court. Irrespective of the propriety of such a temporary restraining order for that purpose, it scarcely affords any precedent for the decision below suspending the rates *after* judicial review.

In the instant case, by suspending the charges "until and unless otherwise ordered by [the District] Court," the District Court clearly violated these elementary principles of administrative law. The suspension not only invades the Commission's exclusive authority to determine the justness and reasonableness of a rate change and to control "the *timing* of rate changes" (*Arrow*, 372 U.S. at 668), but also the decision would require the Court's permission to put the charges into effect regardless of the Commission's conclusion on remand. When the District Court took upon itself the authority to suspend rates, "it usurped an administrative function." *Federal Power Commission* v. *Idaho Power Co.*, *supra*, at 20.

## II

As shown in our Jurisdictional Statement (pp. 13-21), the District Court violated minimal standards of judicial review by basing its decision on a *dictum* in the Commission's opinion and disregarding the Commission's findings.

In response, the plaintiffs-appellees seek to avoid the issue by the device of reconstructing the decision below. They erroneously attribute to the District Court a ruling that the Commission had misinterpreted the statutory requirements of § 15(7). (Wichita Motion, pp. 14-17.) But, as the Department of Agriculture acknowledges in its motion (pp. 4-6), the decision below was not based at all on the Court's interpretation of § 15(7) but rather the alleged inadequacy of the Commission's explanation of its decision.

More specifically, as examination of the Court's opinion readily confirms (App. C3-7), the decision below was based entirely on the Court's dissatisfaction with one of the two reasons cited by the Commission for distinguishing a prior Commission decision. Though purporting to follow *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954), the District Court seized upon the Commission *dictum*, ignored the Commission's principal findings, and made no effort to evaluate the findings "taken as a whole"

(347 U.S. at 651). The plaintiffs-appellees (Wichita Motion, p. 17) characterize the *dictum* as the "Commission's pivotal finding" notwithstanding the Commission's omission of the point from its "chief subsidiary findings" (App. A51) and the Commission's express reliance instead on a "more significant distinguishing feature" (App. A32-33, A51).

In its "chief subsidiary findings", the Commission expressly distinguished the prior decision, *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968) but did so on a wholly different ground. In *Transit Charges*, the Commission had found that "the imposition of the proposed additional $22.00 per car may well result in rates and charges which exceed reasonable maxima" (332 I.C.C. at 686); in the instant case, by contrast, the Commission found (App. A51):

> "Pursuant to orders of the Commission in Docket No. 17,000, Part 7, proceedings, a maximum reasonable level of rates on grain in the West was established. The proposed charges when added to the linehaul rates do not exceed the maximum level prescribed. Where they do, the proposed charges do not apply. Approval of the proposed charges will not contravene our prior orders. Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory*, supra."

Thus, in accord with its own rulings in prior cases,* the

* As we have noted in our Jurisdictional Statement (p. 17), administrative agencies are not rigidly bound by the doctrine of *stare decisis* and are free to adopt new procedures and solutions when dealing with matters within the scope of their expertise. It is nevertheless significant that the procedure which the Commission utilized in the instant proceeding is entirely consistent with the so-called "established rule" of prior Commission decisions set forth in the USDA Motion (p. 5, quoting from *Reconsignment Case No. 3*, 53 I.C.C. 455 (1919)), requiring *"taking into consideration . . .* the entire through service . . . and the compensation heretofore received for such service." (Emphasis added.)

Commission determined that the applicable tariffs were structured so that a combination of the inspection charge and the existing line-haul rate would in no case exceed the maximum rate level now in effect. This determination was plainly a valid exercise of the Commission's authority under § 15(7), especially in view of the limited scope of a § 15(7) proceeding. See *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 689 (1943).

The Commission also reaffirmed the current vitality of the maximum rate level, stating (App. A33):

> "There is possibly no segment of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products. In *Grain and Grain Products*, 298 I.C.C. 261 (1956), the Commission, while vacating prior orders in Docket No. 17,000, Part 7, relating to the rates and charges on coarse grains, specifically left standing the requirement for the establishment and maintenance of the maximum reasonable rates. In a report decided in 1964, in *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S. F. Ry.*, 321 I.C.C. 519, the Commission relied on the rate factors applicable to the movement of grain within the West in concluding that the rates and method of making rates on grain from, to, and within the South were not shown to be unjust, unreasonable, or otherwise unlawful. In *Grain and Grain Products* (Rate Structure Investigation, Part 7), 329 I.C.C. 824 (1967), the rate structure was again reviewed by the Commission. Furthermore, in practically every general freight rate increase proposal made by the railroads in the past 10 years particular attention has been given to the level of the grain rates and, in several instances, the increases in rates on grain and grain products were less than those authorized for the movement of other commodities. *The Docket No. 17,000, Part 7, prescribed rates, as increased through the subsequently authorized general increases,*

*are a currently effective maximum rate level for the movement of these commodities.*" (Emphasis added.)

The plaintiffs-appellees (Wichita Motion, pp. 17-18; see also USDA Motion, pp. 6-8) now criticize the Commission's reliance on the adjusted Docket 17,000 rates;* but yet they themselves, in a related lawsuit attacking the tariffs here in issue, recognized the present applicability of those rates and contended (albeit erroneously) that "[the] subject tariffs would also result in charges which exceed those which these railroads are required to observe as a maximum under the Commission's outstanding orders in its Docket 17,000, Part VII."**

Not surprisingly, appellees would have this Court completely ignore the Commission's detailed findings, pursuant to §15a(2), concerning the impact of the inspection charges on the national freight car shortage (App. A34-42, A49-51, A53-57). Summarizing these findings, the Commission stated in its "chief subsidiary findings" that "The establishment of the proposed charges will eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement

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* In the USDA Motion p. 6, reference is made to the rate from Williston, North Dakota to Minneapolis, Minnesota. It is true that by May 4, 1971, when the challenged tariffs became effective, the rate was 72.5 cents per hundredweight, due to *ex parte* increases. According to the USDA Motion, p. 6, "This example is representative." However, contrary to appellees' argument that the Docket No. 17,000 rates are only "paper rates," the currently effective 72.5 cent rate is the maximum Docket No. 17,000 rate; consequently, by the very terms of the challenged tariffs, no additional charge for in-transit inspection is made.

** *Board of Trade of Kansas City, Missouri, et al.*, v. *The Atchison, Topeka and Santa Fe Railway Company, et al.*, No. 19321-4, filed April 23, 1971 (W.D. Mo.).

of the national freight car supply" (App. A51). This Court has recently recognized the public interest in relieving the "recurring shortage of freight cars available to serve the Nation's shippers." *United States* v. *Allegheny-Ludlum Steel Corp.*, 32 L. Ed.2d 453, 458 (1972). Plainly a significant question is presented for review when a District Court not only violates the most fundamental tenets of judicial review but also totally ignores an agency's carefully considered efforts to deal with a problem of national concern.

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For the foregoing reasons and the reasons set forth in our Jurisdictional Statement, it is respectfully submitted that the questions presented by this appeal are substantial and of public importance and that an order noting probable jurisdiction should be entered.

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OCTOBER TERM, 1972

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

*Appellants,*

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INTERSTATE COMMERCE COMMISSION,

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*Appellees.*

**Appeals from the United States District Court for the District of Kansas**

## BRIEF FOR THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

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vs.

THE WICHITA BOARD OF TRADE, et al.,

*Appellees.*

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**No. 72-433**

INTERSTATE COMMERCE COMMISSION,

*Appellant,*

vs.

THE WICHITA BOARD OF TRADE, et al.,

*Appellees.*

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**Appeals from the United States District Court for the District of Kansas**

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## BRIEF FOR THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

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### OPINIONS BELOW

The opinion of the District Court is not yet reported. The opinion of Division 2 of the Interstate Commerce Commission is reported at 339 I.C.C. 364 (1971), and was affirmed by the Commission *en banc* in an opinion reported at 340 I.C.C. 69 (1971). Copies of the opinions of Division 2, the Commission *en banc,* and the District Court are set forth in the Appendix, pp. 6, 64, and 100, respectively.[1]

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[1] Pages of the Appendix are cited herein as, e.g., "A. 23".

## JURISDICTION

The opinion of the three-judge District Court, convened pursuant to 28 U.S.C. §§ 2325 and 2284, was issued on May 24, 1972. On June 8, 1972, the District Court denied a motion to correct the opinion and entered judgment. On June 9, 1972, appellants in No. 72-214 filed their notice of appeal, and on July 19, 1972, the Interstate Commerce Commission filed its notice of appeal in No. 72-433. On November 13, 1972, this Court noted probable jurisdiction in both appeals. The jurisdiction of this Court to review the District Court's decision on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). E.g., *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943).

## QUESTIONS PRESENTED

1. Does a District Court have jurisdiction to suspend railroad rates which the Interstate Commerce Commission had previously suspended for the maximum period provided for by the statute and had found to be just and reasonable?

2. Did the Court below violate minimal standards of judicial review by basing its decision on a *dictum* in the Commission's opinion and disregarding the Commission's findings?

3. Where the Commission specifically found that the proposed charges when added to the existing line-haul rates do not exceed the maximum reasonable level, found that the accessorial service for which the charges will be made is no longer necessary to the orderly marketing of the commodity, and found that the proposed charges will make a substantial contribution toward alleviating the serious nationwide shortage of freight cars, was the Court below correct in remanding the matter to the Commission because the Commission did not require specific evidence of reve-

nues, costs, and services as to the thousands of individual line-haul rates involved?

## STATUTES INVOLVED

Section 15(7) of the Interstate Commerce Act as amended, 49 U.S.C. § 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to

keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 13(1) of the Interstate Commerce Act as amended, 49 U.S.C. § 13(1), provides:

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable

ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(1) of the Interstate Commerce Act as amended, 49 U.S.C. § 15(1), provides:

> Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

## STATEMENT

This case arises out of a rate suspension proceeding conducted by the Interstate Commerce Commission under § 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7) (*supra*, pp. 3-4), and involving new or increased charges for in-transit grain inspection services. The charges were proposed by the Nation's railroads[2] for the purpose of discouraging in-transit inspections and thereby alleviating the serious nationwide freight car shortage.

Pending investigation and hearing, the charges were suspended by the Commission for the maximum statutory seven-month period, which was voluntarily extended by the railroads for an additional six months, and then were put into effect by the carriers. The Commission found that the charges were just, reasonable and otherwise lawful and would "make a substantial contribution toward the improvement of the national freight car supply" (A. 56).

An action to review the Commission's order was brought in the District Court by the appellees, consisting principally of certain grain dealers and exchanges. The Court remanded the matter to the Commission for further proceedings and *sua sponte* suspended the charges which had been in effect for over a year (A. 106).

Thereafter, this Court entered an order staying the District Court's judgment pending determination of this appeal (A. 111).

### 1. In-Transit Grain Inspection

The in-transit inspection of railroad grain shipments requires stopping the loaded railroad cars enroute, switch-

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[2] The appellant railroads, which operate in the Western District of the United States, are listed in the Appendix, p. 115. No judicial review has been sought as to the charges proposed by eastern and southern railroads.

ing them to separate track facilities where they are held for sampling and grading of the grain, awaiting disposition orders from the shippers after inspection, and switching the cars back into line-haul movement (A. 9). This interruption in the line-haul resulting from in-transit inspection amounts to an average delay of more than three days per inspection (A. 102, 39-47, 53).

This delay can be avoided (1) by having the shipment inspected at point of origin, (2) by having the shipment inspected at destination, or (3) by by-passing the inspection process altogether. However, prior to the filing of the challenged tariffs, "it has been convenient for grain shippers and receivers to have the grain inspected while in transit" (A. 17).

Prior to 1968, inspection of interstate grain shipments was required by federal law (United States Grain Standards Act, 7 U.S.C. § 71 *et seq.*) to determine the official grade of the contents. But in 1968 Congress repealed this inspection requirement (P.L. 90-487, 82 Stat. 761). After a careful review of the statute and its legislative history, the Commission (A. 16) found "that improved car utilization in the movement of whole grain by railroad was a consideration in the revision." The Court below (A. 101) stated, even more emphatically, that "[t]he primary purpose of the Congress was to effect an increased utilization of rail cars."

However, despite the repeal of the inspection requirement and the increasing availability of alternate sampling methods (including the use of recently developed automatic samplers at origin or destination), in-transit grain inspections continued in large numbers. In 1968, there were 464,000 in-transit inspections on 16 western railroads; in 1969, 488,000 on 15 western railroads (A. 10). During this period there also continued to be a nationwide shortage of

freight cars which became critical during grain harvest periods (A. 54).

**2. The Challenged Tariffs**

Faced with this shortage, and in order to reduce the number of in-transit inspections and thereby improve car utilization, the railroads filed schedules with the Interstate Commerce Commission (to become effective March 28, 1970) proposing new or increased charges of approximately $13.50 per car for the first in-transit inspection of grain.[3]

The eastern railroads, which have been making separate charges for this service since 1963, proposed to increase their inspection charges (A. 14, 35). These increased charges by the eastern railroads have not been judicially contested and are not involved in this appeal.[4]

The appellant railroads, which operate in the Western District of the United States and had previously (with some exceptions[5]) provided the service without a separate charge, proposed to institute separate charges for the first in-transit inspection. In this respect, the challenged tariffs place the western railroads on a parity with eastern railroads.

The tariff charges apply only to grain shipments inspected while in-transit. Thus, any additional charge can

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[3] The current charge is approximately $17.00 as a result of subsequent general revenue increases. Even before the instant Commission proceeding, all railroads had charged for the second and subsequent in-transit inspections (although in some instances a second free inspection was permitted at destination in lieu of reconsignment) (A. 16-17).

[4] With respect to movements within the South, the establishment of a separate charge for the inspection service was unopposed even at the Commission level (A. 35).

[5] See, e.g., *Grand Forks Chamber of Commerce* v. *Great Northern Railway Company*, 321 I.C.C. 356 (1963).

be avoided by any grain shipper who elects to have inspection made either at origin or destination on private tracks (or who elects to have no inspection at all) (A. 18-19).

In any event, even as to those shippers who insist on in-transit inspection, the tariffs provide that the inspection charges when added to the line-haul rates cannot exceed the maximum reasonable level of rates on grain in the West established by the Commission. These maxima were first determined by the Commission in two general investigations reported in *Grain and Grain Products*, 205 I.C.C. 301 (1934) and 215 I.C.C. 83 (1936) (referred to as Docket No. 17000, Part 7), and since then have been readjusted through subsequent general rate increases and subjected to continual Commission review (A. 38).

### 3. The Commission Proceeding

In response to protests filed by certain of the appellees and others, the proposed charges were suspended by the Commission pursuant to § 15(7) for the statutory seven-month period, which the appellant railroads voluntarily extended for an additional six months.

#### (a) Division 2's Decision

On April 16, 1971, Division 2 of the Commission issued its decision finding the proposed charges just, reasonable and otherwise lawful, based on the following "chief subsidiary findings" (A. 56):

> "1. The official inspection of grain is no longer mandatory with the amendment in 1968 to the Grain Standard Act, and increased railroad freight car utilization was a consideration in that statutory revision. The statutory change coupled with evidence of record that the inspection may be omitted, made at origin, or made at destination, establishes that in-transit inspection is no longer essential to the orderly marketing of grain.

"2. Pursuant to orders of this Commission in Docket No. 17000, Part 7, proceedings, a maximum reasonable level of rates on grain in the West was established. The proposed charges when added to the line-haul rates do not exceed the maximum level prescribed. Where they do, the proposed charges do not apply. Approval of the proposed charges will not contravene our prior orders. Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra.*

"3. The detention and cost studies presented and discussed establish that the proposed charges are just and reasonable.

"4. The establishment of the proposed charges will eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply."

In addition, each of these "chief subsidiary findings" was supported by detailed supplementary findings:

1. With respect to *the optional character of in-transit inspection under present circumstances,* Division 2 also found that "it is not essential that the grade of the grain be determined while the particular shipment is in transit on the railroad" (A. 17); that, by virtue of the 1968 amendment, "in-transit inspection is now permissive under the Federal statutes and can be either omitted entirely or made through samples taken prior to tender at origin or subsequent to delivery at destination" (A. 18); that "There are numerous shipments of the grain where in-transit inspections are not performed" (A. 18); that "The basic responsibility of the railroads does not require them to provide the service for in-transit inspection" (A. 18); and that such inspection "is an accessorial service for which a charge separate from the line-haul charges may properly be assessed" (A. 19).

2. With respect to *the reasonableness of the aggregate of the proposed charges and the line-haul rates,* Division 2 also reaffirmed the current vitality of the maximum rate level, stating (A. 38):

> "There is possibly no segment of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products. In *Grain and Grain Products,* 298 I.C.C. 261 (1956), the Commission while vacating prior orders in Docket No. 17000, Part 7, relating to the rates and charges on coarse grains, specifically left standing the requirement for the establishment and maintenance of the maximum reasonable rates. In a report decided in 1964, in *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S. F. Ry.,* 321 I.C.C. 519, the Commission relied on the rate factors applicable to the movement of grain within the West in concluding that the rates and method of making rates on grain from, to, and within the South were not shown to be unjust, unreasonable, or otherwise unlawful. In *Grain and Grain Products* (Rate Structure Investigation, Part 7), 329 I.C.C. 824 (1967), the rate structure was again reviewed by the Commission. Furthermore, in practically every general freight rate increase proposal made by the railroads in the past 10 years particular attention has been given to the level of the grain rates and, in several instances, the increases in rates on grain and grain products were less than those authorized for the movement of other commodities. The Docket No. 17000, Part 7, [illegible] through the subsequently [illegible] are a currently effective [illegible] movement of these [illegible]

Since this maximum rate [illegible] by the combination of the [illegible] haul rates, Division 2 [illegible] combination.

3. With respect to *the reasonableness of the proposed charges viewed separately,* Division 2 (A. 19-27) summarized elaborate studies demonstrating that the cost of the service exceeded the amount of the proposed charge.

4. Division 2 further stated (A. 54) that, "While we have concluded that the proposed charges are shown to be just and reasonable on the usual basis of review, it is encumbent to consider also *the effect of such charges on the national shortage of railroad freight cars*" (italics added).

In this regard, Division 2 (A. 55) found that increased car utilization "was the primary objective of the western railroads in proposing the inspection charge. . . ."; that "[b]ecause of the economic impact of the charges, the approval given herein should accelerate the use of the origin samplers"; and "that the in-transit inspection results in an unwarranted loss of car availability, and the elimination of the service, or any significant portion of it, will materially increase car utilization."

The proposed charges became effective on May 4, 1971.

**(b) Decision of the Commission En Banc**

On petitions for reconsideration, the Commission *en banc* affirmed the Division 2 decision on September 21, 1971.

The Commission stated (A. 70) that it was "convinced, as was the division, that the respondent railroads are more concerned with increasing utilization of its freight cars than they are in collecting the inspection charge." The Commission, however, retained jurisdiction "to determine upon still further review whether we will require that funds derived from the assessment of the considered charge, or any part thereof, be used to upgrade the fleets of freight cars operated by respondents," and accordingly

ordered the railroads to submit periodic reports showing the amount of revenue derived from the inspection charges (A. 70-71, 72).

**(c) Subsequent Reports Filed with the Commission**

Pursuant to the Commission's order, the appellant railroads on July 7, 1972, filed their first report with the Commission summarizing the effect of the inspection charges during the first six-month reporting period (October 1, 1971, to March 31, 1972). The report shows that only 25% of the grain shipments on the 17 carriers reporting complete data were inspected in-transit during this period, as compared with 59.8% for the same six months in the year before the inspection charges took effect.

On January 2, 1973, the appellant railroads filed their second report with the Commission summarizing the effect of the inspection charges during the second six-month reporting period (April 1, 1972, to September 30, 1972). The report shows that 24.6% of the grain shipments on the 19 carriers reporting complete data were inspected in-transit during this six-month period—notwithstanding the fact that the challenged tariffs were inoperative from June 8 to July 7, 1972, by reason of the District Court's suspension order prior to the stay granted by this Court.

The impact of the tariffs is further shown by comparing the statistics with respect to April 1971, the last calendar month before the charges were placed in effect, and April 1972, after the charges became effective. The report shows that the percentage of in-transit inspections was reduced from 52.6% in April 1971 to 21.5% in April 1972.

Copies of the two reports have been lodged with the Clerk of this Court.

## 4. The District Court Proceeding

### (a) Nature of the Action

Plaintiffs-appellees Wichita Board of Trade, et al. (less than a third of whom participated in the Commission proceeding) filed the action on November 8, 1971, in the United States District Court for the District of Kansas pursuant to 28 U.S.C. § 1336 to enjoin the order of the Commission with respect to the inspection charges instituted by the western railroads.[6] Judicial review was not sought as to the new or increased charges instituted by the southern and eastern railroads.

Appellant railroads intervened in support of the Commission's order, and appellee Secretary of Agriculture intervened in support of plaintiffs' complaint. In accordance with 28 U.S.C. § 2325, the case was heard by a three-judge court.

### (b) Relief Granted

In its decision rendered May 24, 1972, the District Court ordered the matter "remanded to the Commission for further proceedings consistent with this opinion" (A. 106). In addition, although none of the appellees had even requested such relief, the District Court ordered that the in-

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[6] In an earlier related case, filed after the Division 2 decision but before the tariffs became effective, essentially the same group of plaintiffs-appellees sought to enjoin the carriers from putting the tariffs into effect on the ground (*inter alia*) that "[the] subject tariffs would also result in charges which exceed those which these railroads are required to observe as a maximum under the Commission's outstanding orders in its Docket 17000, Part VII." *Board of Trade of Kansas City, Missouri, et al.* v. *The Atchison, Topeka and Santa Fe Railway Company, et al.*, No. 19321-4, filed April 23, 1971 (W.D.Mo.). The District Court denied the requested preliminary injunction, and the action was then dismissed by agreement of the parties.

spection charges "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (A. 106).

**(c) Opinion Below**

The District Court appears to have sustained the Commission's principal findings. The Court stated (A. 101-102):

> "After extensive hearings the Commission found that: (1) the proposed charges do not apply in any instance where applicable line-haul rates plus the charge would exceed the maximum reasonable rates set forth in Grain and Grain Products, 205 I.C.C. 301 (1934), 215 I.C.C. 83 (1936), (2) inspection of grain is no longer a mandatory requirement of federal law, (3) there is a need for inspection at some point in the grain marketing process, but inspection in-transit is not essential, and (4) grain inspection in-transit is an "accessorial" service for which a charge separate from the basic line-haul charges may be properly assessed. The Commission then found that the proposed charges were just and reasonable in that the railroads established by substantial evidence that the costs associated with in-transit inspection correspond to the level of the proposed charges and that delays resulting from in-transit inspection amount to more than three days per car. There is substantial evidence in support thereof."

The Court objected, however, to a short paragraph in Division 2's 43-page decision in which the Division—referring to a subordinate alternative ground for distinguishing a prior Division opinion[7] (and although then expressly relying on a "more significant distinguishing feature that persuades us that the prior decision is not controlling here")—commented on the impracticality of requiring detailed analysis of every line-haul rate involved (A. 37). On the basis of

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[7] *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968), sustained on other grounds in *Cin. N. O. & T.P.R. Co.* v. *United States* (unreported) (S.D. Ohio 1970), aff'd per curiam, 400 U.S. 932 (1970).

this single statement, the District Court concluded that ". . . the Commission has not adequately explained, for purposes of our review, its departure from prior norms" (A. 105). According to the Court (A. 104-05):

> "In effect, the Commission 'excuses' the respondent railroads in the case before us from meeting the substantial proof requirement in satisfaction of its long established rule predicated upon the rail carriers 'inability' to meet that obligation here. In other words, the rule is viable and applicable where the Commission determines that the railroads are 'able' to carry the burden of proof but it is not applicable in those instances where the Commission determines that the rail carriers are unable to do so. Such a departure is impermissible."
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> "The Commission in the case at bar did not 'explain its departure' from its prior norm by its contention that this case can be 'distinguished' on the apparent proposition that here the railroads were unable to marshal and present substantial evidence to meet the requirements of the norm. The Commission has unwittingly, we believe, adopted an evidentiary rule which is discriminatory per se. . . ."

**(d) Subsequent Proceedings**

Appellants filed motions for correction of the District Court's opinion, contending that the Court had exceeded its authority by suspending the charges. On June 8, 1972, the Court denied the motions (A. 107-08); and on June 19, 1972, the Court denied the appellant railroads' motion for stay of judgment pending appeal to this Court (A. 4).

**5. The Stay Order**

The appellant railroads thereafter applied to this Court for stay of the District Court's judgment on the ground that

the District Court's suspension of the inspection charges was beyond its jurisdiction and would result in a serious shortage of freight cars causing substantial and irreparable injury to the public, the grain industry, and the railroads. On July 7, 1972, this Court entered an order, subject to an accounting and refund condition, staying the judgment of the District Court pending determination of this appeal (A. 111-12).

## ARGUMENT

### INTRODUCTION AND SUMMARY

Underlying each of the questions presented by this appeal is the improper interference by the Court below with the powers and responsibilities of the Interstate Commerce Commission to determine the reasonableness of rates and to deal with other matters of vital importance to the national transportation system—specifically the "recurring shortages of freight cars available to serve the Nation's shippers." *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 745 (1972).

In suspending charges which had been in effect for more than a year, the Court below acted beyond its jurisdiction and in square conflict with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

The Court below also failed to meet the most elementary standards of judicial review by setting aside the Commission's order on the basis of a *dictum* taken out of context and by ignoring the clearly stated findings of the Commission. The Court further misconceived the function and scope of Commission proceedings under § 15(7), as defined by this Court in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943).

### I.

Section 15(7) not only specifically limits the suspension period to a maximum of seven months but also expressly provides that "the proposed change of rate . . . shall go into effect at the end of such period." In *Arrow*, in the light of the statutory scheme and its legislative history, this Court unequivocally held that Congress "meant *to foreclose judicial power to extend that period*" (372 U.S.

at 664) and *"to vest in the Commission the sole and exclusive power to suspend* and to withdraw from the judiciary any pre-existing power to grant injunctive relief" (p. 667). (Italics added.)

The appellees nevertheless seek to distinguish *Arrow* on the ground that a court may suspend rates "after the primary jurisdiction of the . . . Commission has been exhausted." This proposed distinction conflicts with the express rationale of *Arrow*, as Chief Judge Friendly held in *National Small Shipments Traffic Conference, Inc.* v. *United States*, 321 F.Supp. 500, 515 (S.D.N.Y. 1970). The proposed distinction is furthermore inapplicable to the facts of this case, since the District Court's decision on the merits —remanding the case to the Commission for further proceedings under § 15(7)—necessarily reinstated the Commission's "primary jurisdiction."

Accordingly, the District Court's order suspending the charges "until and unless otherwise ordered by [the District] Court" invaded the Commission's exclusive authority to suspend rates and determine the reasonableness of a rate change and also "usurped an administrative function." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

## II.

In addition, the District Court violated minimal standards of judicial review by basing its decision on a *dictum* in the Commission's opinion and disregarding the Commission's findings.

Instead of considering the Commission's "report, read as a whole," *United States* v. *Louisiana*, 290 U.S. 70, 80 (1933), the District Court confined its analysis to a subordinate ground cited by the Commission for distinguishing a prior Commission decision. On this basis, the Court er-

roneously attributed to the Commission a wholly nonexistent "evidentiary rule which is discriminatory per se." The Commission's decision and especially its "chief subsidiary findings" clearly demonstrate the District Court's total failure to deal with what the Commission actually decided.

The Commission not only found that in-transit inspection was an optional accessorial service under present conditions—particularly since the 1968 amendment to the Grain Standards Act—but also made detailed findings sustaining the reasonableness of the aggregate amount resulting from the combination of the inspection charges and the present line-haul rates. The Commission did not "depart" from any "norm"; and indeed its decision is entirely in accord with each of the decisions relied upon by the District Court to show such a "departure."

The Court below further failed to consider "the unique circumstances of this case." *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652 (1954). As the Commission found, the primary purpose of the challenged tariffs was to increase car utilization; and, as subsequent experience has demonstrated, the tariffs have already in large measure achieved that purpose.

## I. THE ORDER OF THE COURT BELOW SUSPENDING THE CHARGES WAS BEYOND ITS JURISDICTION.

Section 15(7) (*supra*, pp. 3-4) authorizes the Commission under certain conditions to suspend the operation of a railroad's newly filed schedule of charges "but not for a longer period than seven months beyond the time when it would otherwise go into effect." In addition, § 15(7) spe-

cifically provides that "the proposed change of rate . . . shall go into effect at the end of such period."[8]

Pursuant to § 15(7), the challenged tariffs were suspended by the Commission for the maximum seven-month period (which the railroads voluntarily extended for an additional six months) and were then put into effect by the carriers. After the rates had been in effect for more than a year, the District Court decreed that the charges "are suspended and shall be ineffective until and unless otherwise ordered by [the District] Court" (A. 106). The Court took this action *sua sponte* without any request to grant such relief, without any discussion of its authority to do so, and without any findings to support an injunction.[9]

## A. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S ARROW DECISION.

In *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), this Court held that § 15(7) withdrew from the courts any power to suspend rates or to extend the maximum suspension period provided by the statute. In rejecting an attempt to enjoin carrier-initiated rates which (like the charges in the instant case) had been suspended for the statutory seven-month period, this Court stated:

> ". . . we cannot suppose that Congress, by vesting the new suspension power in the Commission, intended to

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[8] For the period thereafter, Congress provided two restitution remedies (in addition to a proceeding under § 15(1), *supra*, p. 5): a proceeding under § 13(1) (*supra*, pp. 4-5) and accounting and refund under § 15(7). In this case, a similar accounting and refund procedure was ordered by this Court as part of its order staying the judgment below pending determination of the appeal (A. 111-12).

[9] See Rule 65(d), F.R.Civ.P.: "Every order granting an injunction . . . shall set forth the reasons for its issuance. . . ."

give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head.

"Moreover, Congress engaged in a protracted controversy concerning the period for which the Commission might suspend a change of rates. Such a controversy would have been a futile exercise unless the *Congress also meant to foreclose judicial power to extend that period.*" 372 U.S. at 664 (italics added).

• • •

"We cannot believe that Congress would have given such detailed consideration to the period of suspension unless *it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief.*" Id. at 667 (italics added).

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"There is, of course, a close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates, a jurisdiction to which this Court had, even in 1910, already given the fullest recognition. Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 51 L.Ed. 553, 27 S. Ct. 350. This relationship suggests it would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive." Id. at 668 (footnote omitted).

The power which the District Court in this case purported to exercise is precisely the power which this Court held in *Arrow* was withdrawn by Congress from the judiciary. Thus, the District Court's action not only conflicts with *Arrow* but also is patently beyond the jurisdiction of any federal court.

## B. THE COMMISSION'S PRIOR RULING DID NOT RESTORE JUDICIAL POWER TO SUSPEND RATES, PARTICULARLY ON REMAND TO THE COMMISSION.

Although they did not even see fit to request such relief below, the appellees now seek to justify the District Court's action by attempting to distinguish *Arrow*. The appellees contend that *Arrow* is inapplicable once the Commission has issued a decision in the § 15(7) proceeding—"after the primary jurisdiction of the Interstate Commerce Commission has been exhausted" (USDA Motion to Affirm, p. 10).

The proposed distinction, however, is patently without merit for two reasons: First, the *Arrow* decision is by no means confined to a "primary jurisdiction" test but instead rests on this Court's finding of a congressional intention, based on the statutory scheme and its legislative history, to exclude courts altogether from suspending rates. Second, appellees' argument is self-defeating; for, even assuming *arguendo* that *Arrow* were limited to a "primary jurisdiction" test, as appellees erroneously contend, the District Court's remand of the matter to the Commission "for further proceedings" would have the effect of reopening the § 15(7) proceeding and thereby reinstating the Commission's "primary jurisdiction."

### 1. The Arrow Decision Bars the Judicial Suspension of Rates Regardless of the Stage of the Commission Proceeding.

Section 15(7) not only specifically limits the suspension period to a maximum of seven months but also expressly provides that "the proposed change of rate . . . *shall go into effect at the end of such period.*" (Italics added.) In *Arrow*, in the light of the statutory scheme and its legisla-

tive history, this Court (as already noted, *supra*, p. 21-22) unequivocally held that Congress "meant *to foreclose judicial power to extend that period*" (p. 664) and *"to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief"* (p. 667). (Italics added.) Nothing in the *Arrow* decision even remotely suggests that the issuance of a decision by the Commission would terminate this "sole and exclusive power to suspend" or somehow restore the withdrawn "pre-existing power to grant injunctive relief."[10]

The distinction advanced by the appellees was squarely rejected by Chief Judge Friendly of the Second Circuit, speaking for a three-judge district court in *National Small Shipments Traffic Conference, Inc.* v. *United States*, 321 F.Supp. 500, 515 (S.D.N.Y. 1970)[11]:

> "The tariff has already been suspended for the full period allowed by Section 216(g), indeed even longer as a result of the carriers' agreement; and the rates were placed in effect as a result of the carriers' action, not the Commission's. If the Commission had simply failed to conclude its investigation before the end of the suspension period and the carriers had placed Tariff 500 in effect, *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), would clearly preclude us from enjoining application of the rates. *We see no*

[10] Indeed, in the *Arrow* case, at the time of this Court's decision, Division 2 had announced its decision sustaining the challenged tariffs, and that decision was awaiting possible reconsideration by the Commission. 372 U.S. at 660 footnote 2. The whole thrust of the *Arrow* opinion is flatly contrary to any notion that the injunction remedy prohibited by *Arrow* would suddenly become available as soon as the Commission disposed of the petition for reconsideration.

[11] The case involved the motor carrier counterpart of § 15(7), § 216(g) of the Interstate Commerce Act, 49 U.S.C. § 316(g), containing the same statutory suspension language as § 15(7).

> *relevant difference with respect to our power to do this in the fact that the Commission here concluded its labors* and found, although without adequate justification in our view, that the carriers had sustained their burden of showing the rates to be just and reasonable. In neither situation can we direct the Commission to reinstitute a suspension which has already continued as long as Congress allows." (Italics added.)

Congress, as both the *Arrow* and *National Small Shipments* decisions recognize, "vest[ed] in the Commission the sole and exclusive power to suspend" (372 U.S. at 667).

Since the text of the *Arrow* decision is so fundamentally opposed to their proposed interpretation, appellees resort to a search among *Arrow* footnotes for support. (Wichita Motion to Affirm, pp. 9-10; USDA Motion to Affirm, p. 10.) Remarkably, they rely on footnote 22 (p. 671), referring to "decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction *pending review of an agency's action through the prescribed statutory channels.*" (Italics added.) Such decisions have no application to the District Court's decision in this case, which suspended rates that had been in effect over a year, while simultaneously remanding the "matter" to the Commission "for further proceedings"; the injunction was not issued pending judicial review but instead *after* review, pending the remand to the Commission and possibly beyond. Furthermore, the footnote goes on to state that "Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action, *and has never been recognized in derogation of such a clear congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act.*"[12] (Italics added.)

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[12] See *Iowa City—Montezuma Railroad Ship. Ass'n* v. *United States*, 338 F.Supp. 1383, 1392 (S.D. Iowa 1972) (*Arrow* footnote 22 "not only provides no comfort for [plaintiff's] position, but appears to significantly undermine it").

As Chief Judge Friendly held in the *National Small Shipments* case, *supra*, "the fact that the Commission here concluded its labors" is simply immaterial under *Arrow*. In neither situation can a court extend or reinstate a suspension which has already continued as long as Congress has provided in §15(7). The broad scope of *Arrow* has been consistently recognized in subsequent reported decisions dealing with the issue. See *National Small Shipments, supra; Oscar Mayer & Co.* v. *United States*, 268 F.Supp. 977, 980 (W.D.Wis. 1967); *Wirthmore Feeds, Inc.* v. *Baltimore and Ohio Railroad Co.*, 221 F.Supp. 745, 746 (W.D. N.Y. 1963); *Port of New York Authority* v. *United States*, 451 F.2d 783, 788 (2d Cir. 1971).

**2. In Any Event, A Judicial Rate Suspension Is Barred On Remand to The Commission.**

The strained interpretation of *Arrow* advanced by appellees is without support in the *Arrow* rationale, its language, even its footnotes. But, even assuming that there were any possible merit to such an interpretation, it would not help appellees in this case. Contrary to the premise of their argument, the District Court did not suspend the charges pending its review of the Commission's order, but instead suspended the charges *at the conclusion of the review proceeding* while simultaneously *remanding the "matter" to the Commission "for further proceedings."* Thus, the appellees' argument that courts may suspend "after the primary jurisdiction of the Interstate Commerce Commission has been exhausted" (USDA Motion to Affirm, p. 10) has no application here, since the decision under review would return the case to the Commission's primary jurisdiction.

"[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once

more goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). See also *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 145 (1940); *United States* v. *Saskatchewan Minerals*, 385 U.S. 94, 95 (1966). Furthermore, ". . . all matters of administrative discretion remain open for determination on remand after reversal . . . ." *Federal Communications Commission* v. *Pottsville Broadcasting Company, supra*, at 146.

In the instant case, by suspending the charges "until and unless otherwise ordered by [the District] Court," the District Court clearly violated these elementary principles of administrative law. The suspension not only invades the Commission's exclusive authority to determine the justness and reasonableness of a rate change and to control "the *timing* of rate changes" (*Arrow*, 372 U.S. at 668), but also the decision would require the Court's permission to put the charges into effect regardless of the Commission's conclusion on remand. When the District Court took upon itself the authority to suspend rates, "it usurped an administrative function." *Federal Power Commission* v. *Idaho Power Co., supra*, at 20.

## II. THE COURT BELOW APPLIED PATENTLY ERRONEOUS LEGAL STANDARDS OF JUDICIAL REVIEW.

The Court below not only intruded into the Commission's exclusive suspension power under § 15(7), but also applied patently erroneous legal standards of judicial review.

As this Court noted in *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942):

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the

> resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

See also *American Commercial Lines* v. *Louisville & N. R. Co.*, 392 U.S. 571, 590 (1968). Since the reasonableness of a rate is essentially an issue of fact for the Commission's determination, "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line* v. *United States*, 292 U.S. 282, 286-87 (1934).

In the instant case, responding "to the dynamic character of transportation problems" (*Board of Trade of Kansas City, supra*), the Commission not only "concluded that the proposed charges are shown to be just and reasonable on the usual basis of review . . ." but also considered "the effect of such charges on the national shortage of railroad freight cars" (A. 54).

Unlike the typical tariffs providing for new or increased charges, the tariffs at issue here are not designed to obtain additional revenue for the carriers but instead to discourage in-transit inspections (each causing a delay of more than three days per car) and thereby achieve better car utilization. This purpose of the tariffs was not only recognized by both Division 2 and the Commission *en banc* (A. 55, 70), but has been confirmed by the reports which the Commission ordered the carriers to file concerning the actual effect of the tariffs in operation. The relative number of in-transit inspections during the first six-month reporting period after the charges became effective was reduced by over 58%: in the second six-month period, only 24.6% of the grain shipments were inspected in-transit

(despite the fact that for approximately one month the tariffs were not in effect because of the District Court's suspension order); and in April 1972, only 21.5% were inspected in-transit (in comparison with 52.6% in April 1971, the last month before the charges went into effect)—a reduction of over 59%. See Statement, ***supra***, p. 13.

Thus, the tariffs are already achieving their purpose; and as the use of alternative sampling methods continues to increase—stimulated by the charges provided in the tariffs—the number of in-transit inspections can be expected to continue to decline, with resulting additional benefits to car utilization. Where alternative sampling methods are used (or inspection avoided altogether), the charges provided in the tariffs are, of course, wholly inapplicable.

In any event, as already noted, the Commission sustained the tariffs "on the usual basis of review" (A. 54). The Commission (A. 56) made four "chief subsidiary findings that lead [it] to the ultimate conclusion that the considered schedules are just and reasonable":

> (1) that in-transit inspection is no longer essential to the orderly marketing of grain;
>
> (2) *that the line-haul rates even when increased by the proposed charges do not exceed the maximum reasonable level prescribed by the Commission;*
>
> (3) that (based on detailed detention and cost studies) the proposed charges are themselves just and reasonable for the service to be rendered; and
>
> (4) that "the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply".

The Court below appears to have sustained these findings (see Statement, ***supra***, p. 15). But the Court then pro-

ceeded, for all practical purposes, to ignore them. Instead, the Court based its entire decision on its dissatisfaction with a Commission *dictum* setting forth a subordinate ground for distinguishing a prior Commission decision.

In its opinion, as distinguished from its "chief subsidiary findings", the Commission noted that its prior decision in *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968),[13] was distinguishable in two respects. Preliminarily, the Commission commented on the impracticality of requiring detailed analysis of every line-haul rate involved.[14]

But the Commission's opinion then states (A. 37-38): "However, there is a more significant distinguishing feature that persuades us that the prior decision is not controlling here"—*i.e.*, "that the line-haul rate applicable to any movement of grain within the West when coupled with

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[13] Sustained, on other grounds, in *Cin. N. O. & T.P.R. Co.* v. *United States* (unreported) (S.D. Ohio 1970), aff'd per curiam, 400 U.S. 932 (1970).

[14] "As indicated, approximately 480,000 in-transit inspections took place in 1969 at various points throughout the western district. The line-haul rates applicable on the grain to, from, and through those inspection points number in the thousands and, because of the complexities of the grain rate structure, vary to a large degree. A requirement that the reasonableness of the proposed charges cannot be determined without 'reference to the line-haul rates, the services furnished thereunder, and the cost thereof,' effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge. This inability was not present in the cited proceeding and even there, on appeal, the District Court . . . indicated that the burden of proof required of the respondent railroads was erroneous." (A. 37.) The Commission's language bears a striking similarity to this Court's statement in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 689 (1943) (see *infra*, p. 35).

the proposed charge is less than the maximum reasonable level determined by this Commission" and that "In no instance will the combined rate and charge exceed the maximum level prescribed. . . ." In its "chief subsidiary findings," the Commission relied exclusively on this second "more significant" distinction, stating that "Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra*" (A. 56).

The District Court, however, disregarded the Commission's findings and analysis, and instead seized on the Commission's *dictum* as a basis for setting aside the Commission's order. According to the Court's extraordinary reconstruction of the Commission's decision (A. 104-05):

> "In effect, the Commission 'excuses' the respondent railroads in the case before us from meeting the substantial proof requirement in satisfaction of its long established rule predicated upon the rail carriers 'inability' to meet that obligation here. In other words, the rule is viable and applicable where the Commission determines that the railroads are 'able' to carry the burden of proof but it is not applicable in those instances where the Commission determines that the rail carriers are unable to do so. Such a departure is impermissible."
>
> • • •
>
> "The Commission in the case at bar did not 'explain its departure' from its prior norm by its contention that this case can be 'distinguished' on the apparent proposition that here the railroads were unable to marshal and present substantial evidence to meet the requirements of the norm. The Commission has unwittingly, we believe, adopted an evidentiary rule which is discriminatory per se. . . ."

The opinion below is defective on several grounds:

(A) The District Court's reconstruction of the Commission's decision is plainly erroneous;

(B) Judicial review of the Commission's decision should be based on its report read as a whole, not a *dictum* torn from context; and

(C) The Commission did not "depart" from any "norm."

## A. THE DISTRICT COURT'S PURPORTED RECONSTRUCTION OF THE COMMISSION'S DECISION IS PLAINLY ERRONEOUS.

Even the most casual examination of the Commission decision demonstrates that the District Court's restatement of the Commission's position does not even remotely resemble what the agency actually decided.

The Commission did not "excuse" anyone from meeting a requirement; and it did not, unwittingly or otherwise, adopt a "discriminatory" evidentiary rule.

With respect to the *Transit Charges* decision, the Commission—both in its opinion and particularly its findings (see *supra*, pp. 10-12, 29-31)—made it as clear as language will permit that "the more significant distinguishing feature that persuades us" is that the total of the line-haul rate and the inspection charge did not exceed the maximum reasonable level. Indeed, in its "chief subsidiary findings," the Commission did not even mention the *dictum* on which the Court below constructed its entire analysis of the Commission decision.

## B. JUDICIAL REVIEW OF THE COMMISSION DECISION SHOULD BE BASED ON ITS REPORT READ AS A WHOLE.

In any event, it is a wholly improper exercise of judicial review to base the Court's decision, not on the agency's findings, but on a *dictum* torn from the context of the agency's opinion. Where, as here, the agency carefully details its findings, surely minimal standards of judi-

cial review require that the reviewing court address itself to those findings—rather than concentrate on a single *dictum* and then, remarkably, set aside the agency's order on the ground that the agency did not adequately explain its decision.

It is elementary that judicial review of a Commission decision must be made on the basis of "the report, read as a whole," *United States* v. *Louisiana,* 290 U.S. 70, 80 (1933); *Alabama Great Southern R. Co.* v. *United States,* 340 U.S. 216, 227-28 (1951); and the Commission's findings "taken as a whole," *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 651 (1954). "The report must be considered in its entirety and not any isolated statements therein." *Akron, Canton & Youngstown Ry. Co.* v. *Hagenbuch,* 128 F.2d 932, 937 (6th Cir. 1942).

In *United States* v. *Louisiana, supra,* a Commission order had been set aside by a three-judge district court—as in this case—because of its objection to a "statement separated from its context in the Commission's report . . ." (290 U.S. at 80). On appeal, this Court reversed, holding that "the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data . . ." (p. 80). A reversal on the same ground is even more clearly required here, since the statement seized upon by the District Court in this case was a mere *dictum* referring to a subordinate ground for distinguishing an earlier Commission decision.

### C. THE COMMISSION DID NOT "DEPART" FROM ANY "NORM".

At the outset, it is noteworthy that the Commission is not rigidly bound by a doctrine of *stare decisis.* As this Court held in *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 665-66 (1926), a reviewing court "has no concern with the

correctness of the Commission's reasoning, with the soundness of its conclusions, or *with the alleged inconsistency of findings made in other proceedings before it.*" (Italics added.) The District Court's attempt to restrict the Commission to a supposed "norm" constitutes an improper encroachment upon the authority of the Commission to deal with matters vital to the national transportation system —here, the serious nationwide shortage of freight cars.[15]

But, in any event, the whole premise of the District Court's opinion—*i.e.*, that the Commission "departed" from some "norm" but failed to adequately explain why—is demonstrably false. Contrary to that premise, the Commission did not "depart" from any "norm", and the District Court's attempted reliance on *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954), is wholly misplaced.

The District Court (A. 103-04) imputed to the Commission a "long established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom. . . ." If the District Court means by this "rule" a requirement that the Commission in a § 15(7) proceeding must make a definitive adjudication of every individual line-haul rate involved, there clearly is no such "rule". Such a requirement, this Court held in *Interstate Commerce*

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[15] See 49 U.S.C. § 15a(2), which provides in pertinent part: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, . . . to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service. . . ." The National Transportation Policy, 49 U.S.C. preceding § 1, similarly emphasizes the need to promote adequate transportation conditions suitable to national needs.

*Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943), would be contrary to the limited purpose of § 15(7). In language remarkably applicable to the instant case, this Court pointed out (p. 689):

> "The construction contended for would have the effect either of imposing a practically impossible burden upon the Commission or of making resort to the Commission's powers under § 15(7) so rare as to make such powers of little practical significance. Suspension cases are very numerous, and in many of them the construction contended for would require the Commission to 'readjust the entire rate structure of an important section of the country.'"

Moreover, the Court held (p. 687) that rates not specifically adjudicated in a § 15(7) proceeding ". . . stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations." Such rates may still be challenged through, *e.g.*, a complaint proceeding under Section 13(1) of the Act, 49 U.S.C. § 13(1) (*supra*, pp. 4-5), or by a request that a lower maximum level be established under Section 15(1), 49 U.S.C. § 15(1) (*supra*, p. 5).

On the other hand, if the District Court means by the stated "rule" that the Commission in such cases has usually considered not only the reasonableness of the proposed charge for the service but also the overall reasonableness of the combination of the proposed charges and the line-haul rates, then the Commission's decision here is in full accord with such a "rule"; for that is plainly and unequivocally what the Commission did.

The District Court, however, disregarded the Commission's detailed findings. In addition, as shown *infra*, pp. 38-41, each of the decisions cited by the District Court is either wholly inapplicable or clearly consistent with the Commission's decision in this case.

**1. The Court Below Disregarded the Commission's Findings as to the Reasonableness of the Aggregate Charges and the Optional Nature of the In-Transit Inspection Service.**

The Commission found that, by virtue of the 1968 amendment, "in-transit inspection is now permissive under the Federal statutes and can be either omitted entirely or made through samples taken prior to tender at origin or subsequent to delivery at destination" (A. 18); that "it is not essential that the grade of the grain be determined while the particular shipment is in transit on the railroad" (A. 17); that "There are numerous shipments of the grain where in-transit inspections are not performed" (A. 18); and that "The basic responsibility of the railroads does not require them to provide the service for in-transit inspection" (A. 18). The Commission also pointed out that since 1963 the eastern railroads have been making a separate charge for the first in-transit inspection per shipment (A. 14), and that all railroads have been making separate charges for second and subsequent in-transit inspections (A. 10). Under all the circumstances, and particularly in view of the impact of the 1968 amendment, the Commission found that in-transit inspection "is an accessorial service for which a charge separate from the line-haul charges may properly be assessed" (A. 19).

The correctness of the Commission's findings as to the optional nature of in-transit inspection has been confirmed by shipper practices after the charges went into effect. As the Commission anticipated, the number of in-transit inspections (and resulting car delay) has been sharply reduced, and will continue to decline, as shippers turn to alternative sampling methods to avoid the separate charge. See Statement, *supra*, p. 13.

But even if some shippers insist on demanding in-transit inspections, the Commission specifically found that their *total* charges—the separate inspection charges plus the existing line-haul rates—*would not exceed the maximum reasonable level.*

"A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, 506 (1935). In this case, the Commission found that the line-haul rates, even when increased by the separate inspection charges, did not exceed the upper level of the applicable "zone of reasonableness." Pointing out that "There is possibly no segment of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products," the Commission found that "The Docket No. 17000, Part 7, prescribed rates, as increased through the subsequently authorized general increases, are a currently effective maximum rate level for the movement of these commodities" (A. 38; see Statement, *supra*, p. 11).[16] The Commission further found that the challenged tariffs were structured so that any combination of the inspection charge and the existing line-haul rate would in no case exceed the maximum rate level (A. 14, 38).

Thus, contrary to the implication of the District Court's opinion, the Commission *did* consider the over-all reasonableness of the combination of the proposed charges and

[16] Although the plaintiffs-appellees (Wichita Motion to Affirm, pp. 17-18; see also USDA Motion to Affirm, pp. 6-8) now criticize the Commission's reliance on the adjusted Docket 17000 rates, it is significant that they themselves, in a related lawsuit attacking the tariffs here in issue, recognized the present applicability of those rates and indeed relied on those rates as constituting the current maximum level. See Statement, *supra,* p. 14 n.6.

the line-haul rates. The Commission's determination, furthermore, was plainly a valid exercise of the Commission's authority under § 15(7), especially in view of the limited scope of a § 15(7) proceeding and the availability of alternative remedies to any shipper who may feel himself aggrieved. See *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 689 (1943), *supra*, p. 35.

**2. The Decisions Cited by the District Court Are Wholly Inapplicable or Clearly Consistent with the Commission's Decision in This Case.**

In support of the "long established rule" from which the Commission allegedly "departed" in this case, the District Court (A. 103-04) cited six cases: *Reconsignment Case No. 3*, 53 I.C.C. 455 (1919); *Unloading Lumber to New York Harbor*, 256 I.C.C. 463 (1943); *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673 (1943); *Grand Forks Chamber of Commerce* v. *Great Northern Railway Co.*, 321 I.C.C. 356 (1963); *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968); *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954).

At most, these decisions require (in the District Court's language) "that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom . . ." (A. 103-04). But it is precisely that requirement which the Commission found was satisfied here. Not a single one of these decisions is contrary to the Commission's ruling in this case. There is, in short, no "departure" from any supposed "norm."

In *Reconsignment Case No. 3, supra*, the test laid down by the Commission (quoting *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 61 (1915)) was simply that a separate charge cannot be allowed "without taking

into consideration" the aggregate charges. (53 I.C.C. at 468-69.) The Commission's decision in the instant proceeding clearly met that test. In addition, as to the propriety of making a separate charge for inspection, *Reconsignment Case No. 3* also emphasized—like the Commission's decision in this case—the importance of whether the inspection is required by law. (53 I.C.C. at 467-68, 471.) The 1968 amendment, as already noted, made inspection entirely optional.

In *Unloading Lumber to New York Harbor, supra,* the Commission stated the "rule" as requiring "an adequate showing that the aggregate charge for the through service is reasonable" (256 I.C.C. at 468)—also a standard clearly met here.

In *Terminal Charges at Pacific Coast Ports, supra,* the proposed new charges (for certain terminal services including switching and drayage and "free time") were found to be unreasonable in themselves, and accordingly it was unnecessary to consider the reasonableness of the combination of the proposed charges and the line-haul rate (255 I.C.C. at 682).

*Grand Forks Chamber of Commerce* v. *Great Northern Railway Co., supra,* surprisingly cited by the Court below, is actually strong precedent in support of the Commission's decision. Indeed, the Commission decision (A. 18-19) cites *Grand Forks* for the proposition that "Grain inspection is an accessorial service for which a charge separate from the line-haul charges may properly be assessed." In *Grand Forks,* a separate charge for grain inspections at certain points was sustained by the Commission where it found that the charge generally covered the costs of the railroads' services and, when coupled with the line-haul rates, generally did not exceed the Docket 17000, Part 7 level of rates (321 I.C.C. at 359).

In *Transit Charges, Southern Territory, supra,* it was found *inter alia* that "the imposition of the proposed additional $22 per car *may well result in rates and charges which exceed reasonable maxima*" (332 I.C.C. at 686, italics added).[17] In the instant case, the Commission in its "chief subsidiary findings" specifically distinguished *Transit Charges* on the ground that here the proposed charges when added to the line-haul rates do *not* exceed the maximum reasonable level.

In *Secretary of Agriculture* v. *United States,* 347 U.S. 645 (1954), *supra,* also cited by the Court below in its discussion of the Commission's "rule" (A. 104), it appears that the Commission *made no determination of the reasonableness of the aggregate charges.* However, in the instant case, the Commission *did* make this essential determination.

Furthermore, the nature of the service involved in *Secretary of Agriculture* v. *United States* (as in *Unloading Lumber to New York Harbor* and *Terminal Charges at Pacific Coast Ports*) was fundamentally different. At issue in *Secretary of Agriculture* was a special charge for unloading which had to be performed by the carrier since the goods were not accessible to the consignees. The Court pointed out that "the unloading is an essential part of the delivery and hence is necessarily encompassed in the linehaul" (347 U.S. at 652).

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[17] The order in *Transit Charges* rejecting the proposed charges was affirmed by the District Court solely on the basis of the Commission's finding that "the proposal, if approved, may well cause a substantial diversion of traffic to competing modes. . . ." (332 I.C.C. at 684). *Cin. N. O. & T. P. R. Co.* v. *United States* (unreported) (S.D.Ohio 1970), aff'd per curiam, 400 U.S. 932 (1970). The Commission in the instant case determined that "Similar conclusions are not warranted here" (A. 39).

By contrast, the Commission in the instant case found that "it is not essential that the grade of the grain be determined while the particular shipment is in transit on the railroad" (A. 17); that, by virtue of the 1968 amendment, "in-transit inspection is now permissive under the Federal statutes and can be either omitted entirely or made through samples taken prior to tender at origin or subsequent to delivery at destination" (A. 18); and that "The basic responsibility of the railroads does not require them to provide the service for in-transit inspection" (A. 18).

### 3. The Court Below Further Failed to Consider the Unique Circumstances of This Case.

Only by disregarding the Commission's findings could the District Court infer some "departure" from an alleged Commission "norm." Furthermore, "In dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions." *Secretary of Agriculture* v. *United States*, 347 U.S. at 652.

In that case, unlike this one, not only was the service indispensable to delivery but also the Commission had failed to consider the reasonableness of the aggregate charges (see *supra*, p. 40). Yet, even in that situation, this Court emphasized that ". . . the Commission was not precluded from following a procedure fairly adapted to the unique circumstances of this case" (p. 652).

Here, given "the unique circumstances of this case," the Commission concluded that in-transit grain inspections are *not* an integral part of the line-haul transportation but, in fact, a serious *interruption* which the Commission determined is a significant factor in the "recurring shortages of freight cars available to serve the Nation's ship-

pers." *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 745 (1972).

The decision of the District Court, however, ignores "the unique circumstances of this case" set forth in the Commission's findings, misconceives the nature and scope of a § 15(7) proceeding, and violates the most basic standards of judicial review.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded to that Court with directions to enter a judgment affirming the Commission's order.

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# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL.

No. 72-433

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS*

## BRIEF OF THE INTERSTATE COMMERCE COMMISSION

### OPINIONS BELOW

The opinion of the district court (App. 100)[1] is not yet reported. The report of Division 2 of the Interstate Commerce Commission (App. 6) is published at 339 I.C.C. 364, and was affirmed by a report of the entire Commission (App. 64) published at 340 I.C.C. 69.

[1] "App." refers to the Appendix filed herein in both appeals.

## JURISDICTION

The opinion of the three-judge district court was entered on May 24, 1972. The railroad appellants filed a motion for correction of opinion on May 26, 1972. Appellant, Interstate Commerce Commission, filed a motion for amendment of opinion on May 31, 1972. On June 8, 1972, the district court denied these motions and entered judgment (App. 107). On June 9, 1972, the railroad appellants filed their notice of appeal (App. 109). That appeal (No. 72-214) was docketed on August 7, 1972. The Commission filed its notice of appeal on July 20, 1972 (App. 113). That appeal (No. 72-433) was docketed on September 14, 1972. On November 13, 1972, this Court noted probable jurisdiction and consolidated the two appeals. The jurisdiction of this Court to review the district court's decision on direct appeal rests on 28 U.S.C. §§ 1253 and 2101(b).

## QUESTIONS PRESENTED

The Commission found just and reasonable certain charges that the railroads proposed to assess for diverting carloads of grain to permit in-transit inspection of their contents, an ancillary service not assumed by the railroads as part of their duty to provide transportation. The questions presented are:

(1) Whether the lower court erred in holding that the Commission's order lacked adequate supportive findings, although the Commission had explained fully in its report that the charges were intended to improve car utilization by discouraging in-transit inspection, and that, to the extent that they accrued, such charges, together with the line-haul rates, would be just and

reasonable and not in excess of the maximum reasonable level of rates on grain, as earlier established by the Commission.[2]

(2) Whether the lower court exceeded its powers in suspending the in-transit inspection charges pending remand of the proceeding to the Commission and further order of the court.

**STATUTES INVOLVED**

Section 1(5) of the Interstate Commerce Act, 54 Stat. 900, as amended, 49 U.S.C. § 1(5), provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 15(7) of the Interstate Commerce Act, 24 Stat. 379, 384, as amended, 49 U.S.C. § 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so

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[2] While the Commission's notice of appeal was limited to the suspension issue, this brief will be directed to all issues as to which this Court has noted probable jurisdiction.

orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund,

with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

## STATEMENT

The district court invalidated a decision of the Commission finding just and reasonable certain railroad charges for services connected with the in-transit inspection of grain, and remanded the case to the Commission. In the interim the court below suspended the charges "until and unless otherwise ordered by this Court" (App. 106). The Commission's decision, rendered, among other reasons, to facilitate the movement of grain and to improve the national freight car supply, embraced the finding that imposition of these charges—which were found to be cost-justified and otherwise just and reasonable on the usual basis of review (App. 54)—would tend to deter use of the in-transit inspection procedure and thereby "make a substantial contribution toward the improvement of the national freight car supply" (App. 56).

A. BACKGROUND

This case involves new, separate charges for the in-transit inspection of grain moving in the Western District of the United States.[3] "In-transit inspection" refers to the ancillary service of stopping a carload of grain while it is in transit, switching it out of the train and placing it in a location on the railroad's track facilities for the purposes of permitting the sampling and grading of the contents, awaiting disposition orders from the shipper, and subsequently placing the car back into normal movement. The inspection itself is performed by U.S. Department of Agriculture-licensed inspectors manually probing the grain to obtain samples by which quality can be judged and the result forwarded to the consignee in advance of arrival of the car.

Prior to 1968, the United States Grain Standards Act (7 U.S.C. § 71 *et seq.*) provided that all interstate movements of whole grains must be inspected for the purpose of determining their official grade. While the law did not require that the inspection be performed in transit, over the years this became the customary procedure (App. 14, 17). In 1934 the Commission in *Grain and Grain Products,* 205 I.C.C. 301, 215 I.C.C. 83, approved rail tariffs providing for the inclusion of one in-transit inspection in the line-haul rates, without separate charge, and at least since then the services associated

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[3] "Western District", for purposes of rate proceedings, includes that area of the nation west of the Mississippi River, plus Illinois, Wisconsin and Upper Michigan. New or increased charges were authorized for other parts of the country as well, but no judicial review was sought as to them (See following footnote).

with the first in-transit inspection usually have been included in the line-haul rate.[4]

By the late 1960's, however, it had become apparent that in-transit inspection of grain was no longer suited to present-day marketing and transportation needs. From a transportation standpoint, the practice resulted in tying up badly-needed freight cars for an average of three days per inspection, thus exacerbating the continuing car supply problem, particularly during the critical harvest season (App. 55). Indeed, it was estimated that if the practice were discontinued, the equivalent of 6,000 additional cars would be made available to the national freight car supply (*Ibid.*).

In 1968, Congress amended the Grain Standards Act to eliminate the inspection requirement (Public Law 90-487; 82 Stat. 761). As we shall discuss in greater detail, *infra,* at pp. 18-24, a major purpose of the amendment was to avoid the serious delays and detention of cars switched for in-transit inspection and, thus, to help to alleviate the ever-worsening problem of freight car supply.

The amendment, however, did not immediately achieve its purpose. Despite the fact that inspection

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[4] There were exceptions. Eastern railroads (those operating east of Illinois and north of the Ohio and Potomac Rivers) have collected separate charges for the first inspection since 1963. Those were increased in the instant proceeding, an action not at issue here. The charges are generally new in the South (east of the Mississippi River and south of the Ohio and Potomac Rivers) and in the West, but were challenged here only as regards the West. Even there, however, separate charges for the first inspection have existed previously in certain instances; see, *e.g., Grand Forks Chamber of Commerce* v. *Great Northern Ry. Co.,* 321 I.C.C. 356 (1963).

was no longer required by law, the continued availability of the in-transit inspection privilege without separate charge meant that in-transit inspections actually increased, rising from 464,000 in 1968 to 488,000 in 1969 in Western District alone (App. 10). The car supply problem worsened accordingly, particularly during the harvest season (App. 54).[5]

### B. PROCEEDINGS BEFORE THE COMMISSION

In late 1969, the railroads serving the West filed with the Commission proposed tariff schedules, stating separate charges, apart from the line-haul rates, for the service of in-transit inspection. The stated purpose of the proposal was to discourage use of the inspection service, thereby eliminating delays in the movement of grain and making more cars available for transportation. Upon protest of some of the appellees and others, the Commission's Board of Suspension delayed the effective date of the proposal to October 27, 1970—the maximum seven-month period authorized by statute. After the submission of written evidence, extensive oral hearings were held in July and August 1970. Since the Commission, due to the complexity of the case, could not render a considered decision prior to the expiration of the seven-month suspension period, the railroads voluntarily postponed the effective date of the charges until April 24, 1971.

On April 16, 1971, the Commission's Division 2 issued its report finding the proposed charges just and reason-

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[5] *Cf. United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742; *85th Annual Report of the I.C.C.* (1971), at pp. 25-29.

able (App. 6-63). In its report, the Commission summarized the facts surrounding the proposed separate charges for in-transit inspection (App. 10-16), pointing to the enormous quantity of grain and grain products involved, and detailing the rate structure generally applicable to this trade. In concluding that the new charges were just and reasonable, the Commission considered several relevant factors. First, the inspection charges as proposed do not apply in any instance where applicable line-haul rates plus the charges would exceed the maximum reasonable level of grain rates established in *Grain and Grain Products, supra,* as increased by subsequent decisions authorizing general revenue increases (App. 38, 56). Second, inspection of grain since 1968 has not been a mandatory requirement of law, and a primary reason for removing the requirement was to expedite grain movements and increase the supply of freight cars (App. 15, 56). The Commission considered the current need for inspection and the relative merits of in-transit versus other methods of inspection, and, while it found that there is a need for having inspection available at some point in the grain marketing process, it concluded it need not be while the grain shipment is in transit. Other methods have become available in recent years, notably mechanical sampling at the point of origin, which is authorized by U.S. Department of Agriculture regulations and increasingly is acceptable to members of the grain trade. In short, there was no showing that in-transit inspection continued to be essential to the grain marketing process. In addition, the railroads' basic duty to provide transportation was found by the Commission not to include in-transit in-

spection services, and in fact such services are not performed on numerous shipments. Thus, grain inspection in transit is an "accessorial" service for which a charge separate from the basic line-haul rates may properly be assessed (App. 16-19).

With respect to the reasonableness of the level of the new charges, the Commission found, in findings not challenged here, that the railroads had successfully established that costs associated with in-transit inspection are equivalent to the level of the proposed charges (App. 19-28, 39-53, 56).[6] In connection with this finding the Commission also found that transportation delays caused by in-transit inspection exceed three days per car, which amounted to a loss of 1.5 million car-days per year in the West alone in 1969. Otherwise stated, the nation's car fleet is reduced by 6,000 per year, with attendant losses, financial and otherwise, to the railroads and the shipping public (App. 55).

Turning to the issue of whether the new charges had to be evaluated in conjunction with cost data relating to individual line-haul rates, the Commission concluded they did not. Earlier cases where this had been required, notably *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1969),[7] were distinguished primarily on the ground that here the new charges by the terms of the tariff would not exceed maximum reasonable grain rate levels,

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[6] The basic inspection charge originally was $13.50 per car, but that figure has risen to approximately $17 due to subsequent general revenue increases. The Commission's findings relating to cost of the service were not challenged in court.

[7] Sustained on other grounds, *Cincinnati, N.O. & T.P. R. Co.* v. *United States* [unreported], S.D. Ohio, affirmed *per curiam*, 400 U.S. 932.

as measured by the level established by the Commission in *Grain and Grain Products, supra;* subsequently increased by general revenue increases, after extensive review; and subjected to thorough analysis in a multitude of other proceedings.[8] Thus the maximum levels, which cannot be exceeded by reason of the new charges, were deemed the proper standard to measure the reasonableness of line-haul rates plus inspection charges in the movement of grain (App. 36-38, 56).

Division 2 summarized its findings and concluded its report as follows (App. 55-56):

> In the interest of a better understanding of this complex proceeding we restate, in summary, the chief subsidiary findings that lead us to the ultimate conclusion that the considered schedules are just and reasonable.
>
> 1. The official inspection of grain is no longer mandatory with the amendment in 1968 to the Grain Standards Act, and increased railroad freight car utilization was a consideration in that statutory revision. The statutory change coupled with evidence of record that the inspection may be omitted, made at origin, or made at destination, establishes that in-transit inspection is no longer essential to the orderly marketing of grain.
>
> 2. Pursuant to orders of this Commission in Docket No. 17000, Part 7, proceedings, a maximum

[8] Indeed, the in-transit inspection charges as published by the railroads by their terms were not to apply where the previously-established maxima already applied or where the charges plus the applicable line-haul rate would exceed such maxima.

reasonable level of rates on grain in the West was established. The proposed charges when added to the line-haul rates do not exceed the maximum level prescribed. Where they do, the proposed charges do not apply. Approval of the proposed charges will not contravene our prior orders. Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra.*

3. The detention and cost studies presented and discussed establish that the proposed charges are just and reasonable.

4. The establishment of the proposed charges will eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply.

Accordingly, we find that the proposed new or increased in-transit charges for inspection of grain at various points in the United States are just and reasonable and otherwise lawful.

Following the issuance of the Division 2 report and order, the charges at issue went into effect.[9] After the filing of petitions for reconsideration and replies, and

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[9] The voluntarily postponed effective date of April 24, 1971, was delayed to May 4, 1971, by a court suit brought by certain protestants, including some appellees here, *Board of Trade of Kansas City, Mo.* v. *Atchison, T. & S.F. Ry. Co.*, Civil Action No. 1932-4, W.D. Mo. The tariffs were temporarily restrained for ten days, but following hearing, injunctive relief was denied.

oral argument before the entire Commission, the Commission *en banc* entered a second report and order adopting Division 2's report with only minor modifications and denying the petitions for reconsideration (App. 64-72). The Commission further retained jurisdiction of the matter for the purpose of receiving and considering periodic reports from the railroads indicating revenues derived from the in-transit charges (App. 70-71).[10]

C. THE DECISION OF THE THREE-JUDGE DISTRICT COURT

The proceedings in the lower court were initiated by appellees (less than one-third of which had participated in the Commission proceeding), who sought to enjoin and set aside the decision of the Commission. Appellant railroads intervened in support of the Commission's action, and the Secretary of Agriculture intervened in opposition. The case was heard by a three-judge court pursuant to 28 U.S.C. §§ 2284, 2321-25.

In its opinion entered May 24, 1972 (App. 100-106), the lower court set aside the Commission's order and remanded the case "for further proceedings consistent with this opinion" (App. 106). The court agreed with the Commission's "chief subsidiary findings" (recited

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[10] The first such report was filed on July 7, 1972, which showed that the percentage of shipments inspected for the latest six-month reporting period decreased to 25% from the 59.8% figure applicable to the same period one year earlier, prior to the effective date of the changes. These figures were limited to 17 carriers with complete data. The second report was filed in December 1972, and shows a similar pattern. Copies of these reports have been lodged with the clerk of the court.

at pp. 11-12, *supra*) and found them to be supported by substantial evidence. However, focusing on a subordinate finding of the Commission, the court found error in the Commission's conclusion that consideration of thousands of individual line-haul rates was not required and held that ". . . the Commission has not adequately explained, for purposes of our review, its departure from prior norms" (*Ibid.*). The court, also, without any request for such relief or any discussion of its power to grant it, ordered that the in-transit charges "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (*Ibid.*).

On May 26, 1972, the railroad appellants filed a motion for correction of opinion in which they argued that the lower court exceeded its powers by suspending the charges. The Commission filed a similar motion on May 31, 1972. On June 8, 1972, the district court entered its order denying the motions (App. 107-108).

On June 9, 1972, the railroad appellants filed in the court below their notice of appeal and a motion for stay of judgment pending determination of the appeal. The motion, which was supported by the Commission, was denied on June 19, 1972. The railroads thereafter applied to this Court for a stay, and were again supported by the Commission. On July 7, 1972, this Court entered an order staying the district court's judgment, subject to an accounting and refund provision (App. 111-112). On July 20, 1972, the Commission filed its notice of appeal.

The railroads' appeal was docketed on August 7, 1972, as No. 72-214. The Commission's appeal was docketed September 14, 1972, as No. 72-433. On November 13,

1972, this Court noted probable jurisdiction and consolidated the two appeals.

## SUMMARY OF ARGUMENT

The traditional patterns of marketing grain in America have been disrupted in recent years,[11] and among the factors both contributing and resulting from such change has been the elimination of mandatory U.S. Department of Agriculture inspection of grain shipped in interstate commerce.[12] The 1968 amendment of the United States Grain Standards Act, 7 U.S.C. § 71 *et seq.*, eliminating this requirement, obviated the need for the railroads' continuing to provide for in-transit inspection of grain, a "service [that previously sprang] from a requirement of law based on business usage and the necessities of the trade." *Reconsignment Case No. 3*, 53 I.C.C. 455, 468 (1919).

When thereafter they nevertheless found that the in-transit inspections of grain were continuing and even being requested more frequently, the railroads serving the West sought to impose separate charges for this service. Like demurrage, the proposed in-transit inspection charges "have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote efficiency by providing a deterrent against undue deten-

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[11] *Arrow Co.* v. *Cincinnati, N.O. & T.P. R. Co.*, 379 U.S. 642, affirming (in effect) *per curiam*, 229 F. Supp. 572 (S.D. Ohio); *Kansas Corp. Comm'n* v. *Arrow Co.*, 361 U.S. 353, affirming *per curiam*, 176 F. Supp. 411 (N.D. Ala.).

[12] P.L. 90-487; 82 Stat. 761.

tion." *Turner Lumber Co.* v. *C.M. & St. P. Ry.*, 271 U.S. 259, 262-63.

The Commission in the assailed orders found the in-transit inspection charges to be just and reasonable. The free use by the grain trade of the detention privileges had resulted in the loss in the number of available freight cars by several thousand annually—a loss that at times of acute equipment shortages neither the shippers nor the railroads of the country could well afford; by discouraging the use of the inspection service, such charges, the Commission found, would enhance the utilization of available rail cars. Indeed, as the Commission noted, improvement in car utilization was one of the reasons for the statutory amendment eliminating mandatory grain inspection.

The Commission further found that the proposed charges and the resulting level of total charges to be paid by the shipper were just and reasonable. The in-transit inspection charges, the Commission noted, were not to apply when the underlying line-haul rates for the movement of the grain, or such line-haul rates together with the charges, exceed the rates established by the Commission as reasonable maxima in prior investigations of railroad grain rates. In other words, the Commission found, "the line-haul rate applicable to any movement of grain within the West when coupled with the proposed charge is less than the maximum level determined by this Commission."

The lower court misapprehended and deprecated the

Commission's finding and, therefore, erroneously concluded that the Commission had failed to observe its prior decisions, discussed by this Court in *Secretary of Agriculture* v. *United States,* 347 U.S. 645, that the publication of separate charges for services previously performed by the railroads at the line-haul rates ordinarily requires a determination of the justness and reasonableness of such charges together with the line-haul rates. This, of course, was precisely what the Commission did herein, and its findings were well within its discretion.

Assuming *arguendo* that the lower court correctly held that the Commission failed adequately to explain its approval of the in-transit grain inspection charges, it nevertheless exceeded its authority in suspending such charges pending remand of the proceeding to the Commission and further order of the court. This Court's decision in *Arrow Transp. Co.* v. *Southern Ry.,* 372 U.S. 658, permits of no doubt that the power to suspend rates has been vested exclusively, and then only under limited circumstances, in the Commission. The reviewing court's task "ends when an error of law is laid bare." *Federal Power Comm'n* v. *Idaho Power Co.,* 344 U.S. 17, 20. Thereafter, it is for the Commission to fashion appropriate relief consistently with the court's opinion; certainly the court cannot itself "reinstitute a suspension which has already continued as long as Congress allows." *National Small Shipments Traffic Conf.* v. *United States,* 321 F. Supp. 500, 515 (S.D.N.Y.).

## ARGUMENT

### I.

### THE COMMISSION ACTED WITHIN ITS DISCRETION IN APPROVING SEPARATE REASONABLE CHARGES FOR IN-TRANSIT INSPECTION AS A MEANS OF HELPING TO ALLEVIATE THE FREIGHT CAR SHORTAGE BY DISCOURAGING USE OF THIS TIME-CONSUMING, DISRUPTIVE SERVICE

#### (A) A MAJOR PURPOSE OF THE 1968 AMENDMENTS TO THE GRAIN STANDARDS ACT WAS TO IMPROVE THE AVAILABLE FREIGHT CAR SUPPLY BY DISCOURAGING IN-TRANSIT INSPECTION.

The "recurring shortages of freight cars available to serve the Nation's shippers" (*United States* v. *Allegheny-Ludlum Steel Corporation*, 406 U.S. 742) has been a matter of serious concern to Congress and the Commission, as well as shippers and carriers, for a number of years. Within the past decade, Congress has conducted hearings on the specific problem of freight car shortages,[13] and has considered various bills designed, in

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[13] Hearings before the Freight Car Shortage Subcommittee of the Senate Committee on Commerce, 89th Cong., 1st Sess.; Hearings on Freight Car Shortages Before the Special Subcommittee on Investigation, House Committee on Interstate and Foreign Commerce, 92nd Cong., 1st and 2nd Sess., Serial Nos. 92-81 and 92-82. In H. Rep. No. 92-1384, 92nd Cong., 2nd Sess., at p. 22, the House Subcommittee specifically referred to the Commission's decision in this case and noted approvingly:

> Recently, rail carriers have further improved their utilization of grain freight cars by imposing a grain inspection charge for en route inspection. In the case of one major midwestern carrier, a $17 inspection charge eliminated an estimated 80 percent of the en route inspections. Rather than pay

one way or another, to assure a more adequate car supply.[14]

In 1967, the U.S. Department of Agriculture recommended the amendment of the Grain Standards Act to eliminate the requirement, imposed when the Act was first enacted in 1916, of mandatory federal inspection of grain shipped in interstate commerce. Pointing to the changes in grain merchandising practices and transportation methods, the Department urged that mandatory inspection is no longer necessary or practical and that inspection should be placed on a voluntary basis.[15]

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this charge, grain shippers found it preferable to change their marketing practices and to provide for origin sampling. As a result, this same carrier testified it was able to save about 1,000 cars per day. Currently, the legality of this charge is being challenged in the courts and, unfortunately, further delays may result.

[14] See, *e.g.*, Pub. L. 89-430, 80 Stat. 168 (1966), amending § 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a); H. Rep. No. 1183, 89th Cong., 2d Sess., Hearings on Freight Car Supply Before the Surface Transp. Subcomm., Senate Comm. on Commerce, 91st Cong., 1st Sess., Serial No. 91-8; S. Rep. No. 92-982 on S. 1729, 92d Cong., 2d Sess.; Hearings on S. 1415, S. 1729, S. 1730, S. 1731, Before the Special Subcomm. on Freight Car Shortages, Senate Committee on Commerce, 92nd Cong., 1st Sess., Serial No. 92-35; S. Rep. No. 92-1155, on S. 2362, the proposed Surface Transp. Act of 1972, 92nd Cong., 2d Sess. A comprehensive summary of the Commission's own efforts over the years in the area of car supply and utilization appears in a statement of Commissioner Rupert L. Murphy, "Freight Car Supply and Utilization—the Regulatory View," attached to House Hearings, *supra*, at fn. 13, pp. 753-789.

[15] See letter from Orville L. Freeman, Secretary, Department of Agriculture, dated June 20, 1967, attached to S. Rep. No. 1372, 90th Cong., 2nd Sess., at pp. 14-15; letter of Secretary Freeman attached to H. Rep. No. 1344, 90th Cong., 2d Sess., at pp. 5-9; Statement of George R. Grange, Dep. Admr. for Marketing Services, Consumer and Marketing Service, USDA, included in Hearings on H.R. 2121

Although focusing primarily on marketing factors, the Department of Agriculture also directed attention to the car supply problem, noting that the "stopping and holding of the cars [for inspection] increases their turnaround time and contributes to the boxcar shortage." [16] This point was emphasized by various officials and individuals directly concerned with car supply problems, who urged Congress to adopt the proposed amendment for this very purpose. Thus the Department of Transportation, supporting enactment of the bill, pointed out: [17]

> The Department believes the bill would have the desirable effect of putting more freight cars into the rail transportation pipeline by eliminating those statutes which now clog up the pipeline with unnecessary regulatory inspections. Under the present provisions of the act, grain moving in interstate commerce is required to be sampled and certified by official grain inspectors. Since official sampling of grain is not available at the small origin elevators and often not practical at intermediate and terminal elevators, official grain inspection is accomplished in-transit at rail points. The enroute stopping of cars causes further delays and congestion due to the rehandling, rebilling, and holding of cars. The stopping and holding of cars at rail points

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and H.R. 11162, before a Subcomm. of the Committee on Agriculture, Ser. R., Part 1 (1967), at pp. 11-14.

[16] H. Rep. No. 1344, 90th Cong., 2d Sess., at p. 18.

[17] Letter from John L. Sweeney, Assistant Secretary for Public Affairs, Office of the Secretary of Transportation, attached to S. Rep. No. 1372, 90th Cong., 2d Sess., at p. 18.

> results in higher operating expenses, lost car utilization, and of major importance, decreased capacity of the existing railcar fleet to handle available grain tonnages. Elimination of in-transit inspection of grain would add an equivalent capacity to the car fleet, something equal to tens of thousands of freight cars. The benefits to shippers and carriers are obvious—cost of conducting transportation is dramatically reduced and customer service improved.

Similarly, the Interstate Commerce Commission stated its position to Congress: [18]

> While we have no specific comments to offer on the specific provisions of this bill, we believe that enactment of legislation of this type would contribute materially to improving the efficient utilization of railroad freight cars. For some time, the Commission has been investigating various aspects of the railroad freight car problem in an effort, among other things, to determine what steps should be taken to obtain improved service and more efficient use of the carriers' equipment. Our field investigations over the years have indicated considerable car delays in the holding of grain for inspection. We

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[18] Letter from Hon. William H. Tucker, Chairman, and Paul J. Turney and Lawrence K. Walrath, Committee on Legislation, Interstate Commerce Commission, attached to H. Rep. No. 1344, 90th Cong., 2d Sess.; see also Hearings Before a Subcomm. of the Senate Committee on Agriculture and Forestry on S.272, S.2069 and H.R. 15794 (1968), at 60-63; Hearings Before the Subcomm. on Livestock and Grain, House Comm. on Agriculture, on H.R.2121 and H.R.11162, Ser. R, Part 2 (1967), at 105-108.

> have also found that grain inspection facilities are nowhere near adequate to meet peak receipts resulting in many cars being held short of terminals awaiting placement on inspection tracks.
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> * * * * *
>
> Since enactment of this bill would give wide latitude to the Secretary of Agriculture to develop and promulgate new methods for the inspection of grain, it could substantially reduce the number of car days lost by cars of grain held for inspection under present procedures. In turn, this would result in improved freight car utilization and make many more cars available to the shipping public. For these reasons, we favor the enactment of H.R. 11162.

The bill was also supported by railroads, grain dealers, legislators and State regulatory officials, whose reasons invariably included the expectation of more efficient utilization of cars.[19]

When the bill was debated on the floor of the House, Representative Purcell of Texas, Chairman of the Subcommittee on Livestock and Grains, House Committee on Agriculture, focused explicit attention on the benefits

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[19] *E.g.*, Statement of D.A. Baumgartner, representing the Association of American Railroads, included in Hearings before a Senate Subcomm. on S.272, S.2069, and H.R. 15794, *supra*, at pp. 103-105; Remarks of Sen. Metcalf of Montana, included in Hearings Before a House Subcomm. on H.R. 2121, and H.R. 11162, Ser. R., part 1, *supra*, at pp. 37-40; Statement of Rep. Olsen of Montana, *id.*, at p. 45; Statements of Frank C. Miller of the Grain and Feed Dealers National Ass'n, Milton Morrison of the Morrison Grain Co., Salina, Kan., John L. Finsness of the North Dakota Pub. Serv. Comm'n, all included in House Hearings, *supra*, part 2, pp. 6, 11-12, 66.

of the bill in terms of freight car supply (114 Cong. Rec. 15517):

> * * * There is another point that needs to be made about the advantage of going to permissive inspection of grain shipped within domestic markets. During examination of this legislation before the subcommittee on Livestock and Grains, which I have the honor to chair, the Interstate Commerce Commission supported this bill as an approach toward easing another problem that exists in our transportation network—that is a problem that occurs during the peak periods of rail transportation of grain, known as a 'boxcar shortage.' In a communication to the subcommittee, the ICC indicated that considerable delays occur in shipment, due to the holding of grain for inspection. The Commission has also found, in their investigations, that grain inspection facilities are not even remotely adequate to meet peak receipts—resulting I am sorry to say, in many cars held much longer than they should at terminals while awaiting inspection.
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> The Interstate Commerce Commission, accordingly felt that the latitude given this bill to develop and promulgate new methods for the inspection of grain, chiefly through mechanical sampling devices, would result in a substantial reduction of the number of car-days lost by cars held for inspection under present procedures.

Similarly, Representative Catherine May of Washington urged passage of the bill in hopes "that use of mechanical sampling equipment will help alleviate the

recurring problem of boxcar shortages, by reducing the amount of time trains will be required to wait for inspection" (114 Cong. Rec. 15519); and Representative Kleppe of North Dakota added, "This bill will reduce the turn-around time on boxcars used for hauling grain which will be of great benefit in reducing the boxcar shortages plaguing not only North Dakota, but other grain-producing states as well" (114 Cong. Rec. 15519).

In sum, as the Commission found, there can be no doubt that "improved car utilization in the movement of whole grain by railroad was a consideration in the revision" of the Grain Standards Act to eliminate the requirement of mandatory inspection (App. 16, 69). It is in light of this statutory purpose that the railroads' proposal, and the Commission's decision, must be evaluated.

### (B) THE COMMISSION PROPERLY CONCLUDED THAT THE RAILROADS' PROPOSED SEPARATE CHARGE FOR IN-TRANSIT INSPECTION HAD BEEN SHOWN TO BE JUST AND REASONABLE

It is important at the outset to emphasize the essential difference between this case and the usual rate increase proposal. Ordinarily, a carrier proposes a rate increase for the purpose of obtaining the additional revenue to be derived therefrom. Here, in contrast, the railroads avowedly hoped never to collect one penny of additional revenue from the new in-transit charges. Rather, they declared that the entire purpose of the separately-stated charges was to discourage shippers from requesting in-transit inspection, thereby freeing the freight cars for use in moving freight. The

ultimate effect will, of course, be an increase in total revenue, since the more effective utilization of their cars will enable the railroads to transport traffic they would otherwise be unable to handle (App. 70).

There can be no question that the Commission has the power as well as the obligation to deal with the effect of ratemaking on transportation conditions generally. See Section 15a(2) of the Interstate Commerce Act, 49 U.S.C. § 15a(2).[20] Thus, this Court has emphasized that the agency must not concentrate on cost-revenue matters alone, but must give due consideration to the other public interest factors specified by the statute. *Alabama G.S. R. Co.* v. *United States*, 340 U.S. 216, 223, and cases cited therein; see also *Board of Trade* v. *United States*, 314 U.S. 534, 546, emphasizing the Commission's "duty of being responsive to the dynamic character of transportation problems." To the extent that the decision may depend on a forecast of what may take place in the future, it is a matter for the sound judgment of the Commission. *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241; *Board of Trade* v. *United States, supra*, 314 U.S. at 546.

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[20] Section 15a(2) provides:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Encouraging the more efficient utilization of cars long has been recognized as a factor appropriate for consideration in rate-making. Demurrage charges, for example, which are charges assessed for delay in loading or unloading cars, have been recognized by the courts and the Commission as properly involving in part compensation to the carrier and in part a penalty to encourage the prompt release of equipment. See, e.g., *Turner Lumber Co.* v. *Chicago, M & S & P Ry.* 271 U.S. 259, 262-63; *Pittsburgh & Ohio Mining Co.* v. *B & O R.R.*, 40 I.C.C. 408, 409 (1916). As this Court pointed out in the *Turner Lumber Company* case, *supra*, 271 U.S. at 262-63:

> The efficient use of freight cars is an essential of an adequate transportation system. To secure it, broad powers are conferred upon the Commission. Compare *United States* v. *New River Co.*, 265 U.S. 533; *Avent* v. *United States*, 266 U.S. 127; *United States* v. *P. Koenig Coal Co.*, 270 U.S. 512. One cause of undue detention is lack of promptness in loading at the point of destination. Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the ordinary duties of a carrier. The right to assess charges for undue detention existed at common law. Now, they are subject, like other freight charges, to regulation by the Commission. Demurrage charges are thus published as a part of the tariffs filed pursuant to the statutes.

> All demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention. *Pennsylvania R.R. Co.* v. *Kitanning Iron & Steel Co.*, 253 U.S. 319, 323; *Edward Hines, etc., Trustees* v. *United States*, 263 U.S. 143, 145.

See, also, *Union Pacific R. Co.* v. *United States*, 362 U.S. 327, 328, in which this Court stated, in sustaining a charge imposed by the railroads for delaying carloads of lumber in transit awaiting the shipper's securing the most favorable market:

> The delay is accomplished by the holding of cars on sidings at certain points on its trunk lines awaiting diversion orders to move the shipment forward over the railroad's regular service. This affords the shipper additional time to find a market for the lumber while it is in transit. This service, the District Court found, incurred additional "operational problems and costs" for appellant, including switching, siding and "per diem cost for the use of foreign cars" not present in its fast freight service and not included in its published tariff. We agree with the District Court that such delayed service constitutes the furnishing of additional "privileges or facilities" under § 6(7) of the Interstate Commerce Act, and, therefore, must be published and filed in its tariff, 49 U.S.C. § 6(1) [Citation omitted].

Here the Commission, in findings sustained by the lower court (App. 102), concluded that each car sub-

jected to inspection is delayed in transit more than three days, cumulating in 1969 in an astounding total of 1.5 million car-days in the Western States alone. Otherwise stated, the practice of in-transit inspection reduced the nation's fleet by some 6,000 cars per year, with all the other losses, financial and otherwise, which that figure entails—a loss of $10 million annually to the railroads alone (App. 56).

These figures admittedly would be of lesser force if there were any reason to believe that in-transit inspection is necessary to the continued efficient operation of the grain trade. But clearly there is not. At most, in-transit inspection is an advantage to some part of the grain trade, which has managed to profit from the old system; hence, the remark of appellees (who are for the most part large grain dealers and boards of trade) that this "penalty would destroy the grain marketing system" (Wichita Motion, p. 3). Notwithstanding, the record shows that (1) technology increasingly permits the use of other, non-transit-related inspection methods (App. 17-18); (2) many grain dealers, as well as the U.S. Department of Agriculture by regulation, accept grain inspected in other ways (*Id.*); (3) many members of the grain trade supported the removal of mandatory inspection before Congress in 1968 on the express ground that such action would facilitate the movement of grain by reducing the number of in-transit inspections; and (4) significant quantities of grain already moved without in-transit inspection before these charges were proposed, including *all* grain by truck or barge and much by rail (App. 15). Thus the circumstances today are altogether different than

when the practice of performing in-transit inspection of grain was assumed by the railroads under the line-haul rates, as approved by the Commission in *Reconsignment Case No. 3,* 53 I.C.C. 455, 468 (1919). No longer can it be said that "the service springs from a requirement of law based on business usage and the necessities of the trade" (53 I.C.C. at 468). Rather, the proposed charges—like the charges for reconsignment generally—have as their primary purpose the "increase [in] car efficiency by reducing the delays incident to reconsignment." *Reconsignment Case,* 47 I.C.C. 590, 593 (1917).

The first question before the Commission, thus, was whether the separately-stated charge for in-transit inspection would have the desired effect of discouraging the use of the inspection service. The Commission's conclusion that it would have this effect was entirely reasonable. As noted *supra* at pp. 6-7, for many years the in-transit inspection service had been included within the line-haul rates. As a practical matter, from the shipper's standpoint the service was thus "free"—*i.e.,* the shipper paid the same rate whether or not he used the service. Thus, even though inspection was no longer required by law, the natural inclination of shippers was to continue to demand in-transit inspection, since it added nothing to their costs. The revision of the tariffs to eliminate the service from the line-haul rate, assessing a separate charge for in-transit inspection, quite obviously would create an incentive for shippers to reevaluate their actual need for in-transit inspection and discourage its use except where it results in some measurable benefit to the shipper.

The Commission thus concluded that the separately-stated charges would have the desired effect of discouraging the use of in-transit inspection, thereby increasing the supply of cars available for moving traffic [21] (App. 55-56). The Commission then turned to the question of the justness and reasonableness of the specific level of charges here proposed. The Commission initially found that grain inspection in transit is an "accessorial" service, comparable to destination storage in cars, rather than an essential part of the line-haul transportation, so that a separate charge may properly be assessed (App. 56), and that the costs associated with in-transit inspection correspond to the level of the proposed charges (*Ibid.*). Those findings were sustained by the lower court as supported by substantial evidence (App. 101-102). The Commission further found that the total charge for the line-haul rates plus the separately-stated inspection charges does not exceed a just and reasonable level for the total services provided. It is this latter finding that was overturned by the district court, on the basis of an alleged failure on the part of the Commission to "explain its departure from prior norms" (App. 104).

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[21] The correctness of the Commission's conclusion is confirmed by this actual experience of the carriers since May 4, 1971—the date on which the new charges went into effect. In a report filed with the Commission on July 7, 1972, it was revealed that the percentage of grain shipments for which in-transit inspection was requested had declined from 60% in a six-month reporting period prior to the effective date of the charges to 25% for a corresponding period after the effective date. This results in the equivalent of an additional 3,500 cars added to the Nation's freight car supply.

We will demonstrate that the lower court's ruling is without foundation.

The Commission took note of the fact that in its prior decision in *Transit Charges, Southern Territory,* 332 I.C.C. 664, (1969),[22] it had disapproved a proposed separate charge for a different type of service (a transit privilege) for failure to adduce specific evidence concerning "the line-haul rates, the services furnished thereunder, and the cost thereof." (*Id.* at 683-84). But it concluded that the instant proceeding was distinguishable in two respects: (1) the vast number of varying line-haul rates comprising the complex grain rate structure, which makes analysis of the costs and services under each rate virtually prohibitive (App. 37); and (2) what the Commission described as "a more significant distinguishing feature"—the fact that here the combination of the line-haul rates plus the separately-stated in-transit charges would in no event exceed the maximum reasonable rate level previously determined by the Commission (App. 37-38). In reversing the Commission's decision, the district court virtually ignored the second, and "more significant" distinction, merely observing that the maximum reasonable rates on grain "had been known for years" (App. 103), and held that the practical reasons for which the Commission had concluded that the submission of evidence relating to individual line-haul rates was not feasible here constituted an impermissible and discriminatory "departure from prior norms"

[22] Sustained on other grounds in *Cincinnati, N.O.&T.P. R. Co.* v. *United States,* C.A. No. 6992, S.D. Ohio (unreported), aff'd 400 U.S. 932.

which was not adequately explained (App. 104-106). But wholly apart from the impracticality of demanding evidence as to individual line-haul rates on grain,[23] the alleged "norm" to which the district court refers simply has no application when, as here, the maximum reasonable level of the total rate can be determined by reference to prior Commission decisions.

There is, of course, no one rate level which constitutes the sole "reasonable" rate for a particular movement. Rather, "[a] zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 506. Thus, the essential question in evaluating a proposed rate increase is whether it has been shown to be no higher than the reasonable maximum for the movement involved.

The critical factor here is the fact that, by the very terms of the tariff, the combination of the proposed in-transit charges and the line-haul rates can never exceed the maximum reasonable level of grain rates established in the "Docket 17000, Part 7, Rate Structure Investigation", *Grain and Grain Products*, 205 I.C.C. 301 (1934); 215 I.C.C. 83 (1936), as raised by subsequent general revenue increases. The "Docket 17000,

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[23] This is not to say that the impracticality of requiring evidence pertaining to line-haul rates is an insignificant matter. There are thousands of such rates, varying to a large degree, and all part of a complex grain rate structure. As the Commission stated (App. 37), such a requirement could effectively preclude the railroads from ever establishing a separate charge for in-transit inspection, regardless of need. *Cf. Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 689.

Part 7, Rate Structure Investigation," in which the Commission undertook a comprehensive inquiry into the grain rate structure, was an outgrowth of the Hoch-Smith Resolution of 1925,[24] in which Congress ordered the Commission to undertake a "thorough investigation" of the rates and rate structures of the Nation's carriers, with particular emphasis, "[i]n view of the existing depression in agriculture," on rates involving agricultural commodities. The result of that investigation was the prescription by the Commission of maximum rate levels on grain (*Grain and Grain Products, supra,* 205 I.C.C. at 301; 215 I.C.C. at 83).[25] Since that time, grain rates have been subjected to continuous review, including various structural reforms (*e.g., Grain and Grain Products,* 298 I.C.C. 261 (1956); *Grain and Grain Products,* 329 I.C.C. 824 (1967)), and investigations instituted upon the complaint of various shippers (*e.g., Southeastern Ass'n of R. Util. Comm'rs* v. *Atchison, T.&S.F. Ry. Co.,* 321 I.C.C. 824 (1967), and cases cited therein).

The level of the grain rates, of course, has not remained constant since their original prescription in 1934. Like rates on virtually all commodities, they periodically have been increased, largely as a result of general revenue increase proceedings, dictated by rising labor and other costs. Unlike rates on many commodities, however, grain rates have been the subject

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[24] 43 Stat. 801, 49 U.S.C. § 55.

[25] Rates had earlier been prescribed in *Grain and Grain Products,* 164 I.C.C. 619, 173 I.C.C. 511, but those orders were vacated by this Court in *Atchison, T.&S.F. Ry. Co.* v. *United States,* 284 U.S. 248.

of particularized attention in virtually all those general increase proceedings; see, *e.g.*, as recent examples, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 219-228 (1971); *Increased Freight Rates, 1967*, 332 I.C.C. 280, 300 (1968), in which the appropriate level of rates on grain was discussed in some detail.

The Commission concluded that, in light of this history of particularized attention to grain rate levels, the maximum reasonable rates permitted under the Docket 17000, Part 7 prescription, as increased by subsequent general increase proceedings, the "currently effective maximum rate level for the movement of the commodities" (App. 38), was an appropriate yardstick by which to measure the reasonableness of the proposed increases here involved. Since the tariff explicitly provided that the in-transit inspection charges were not to apply when the line-haul rates or the combination of the line-haul rates plus the new in-transit inspection charges exceed the level previously determined in those proceedings to be reasonable, the Commission concluded that the proposed charges had been shown to be within the zone of reasonableness.

Appellees argue at length that the standard employed by the Commission is impermissible on the ground that the Commission in a general increase proceeding does not pass upon the justness and reasonableness of individual line-haul rates. But while the validity of individual rates may not be at issue in a general increase proceeding, the Commission nevertheless does find the overall level of rates approved by it to be just and reasonable (App. 38).[26] It is then incum-

[26] See also, *e.g.*, *Increased Freight Rates, 1967*, *supra*, 332 I.C.C. at 346 (1967).

bent on anyone aggrieved by the increase as applied to specific situations to file a complaint under section 13 (1) of the Act, 49 U.S.C. § 13(1), or request the Commission to determine and prescribe a lower maximum level under section 15(1), 49 U.S.C. § 15(1). *National Small Shipments Traffic Conf.* v. *United States*, 321 F. Supp. 500, 505 (S.D.N.Y.); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D.D.C.), affirmed by equally divided court, 400 U.S. 73; *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 488 (E.D. Va.); *Increased Freight Rates, 1968*, 332 I.C.C. 714, 792 (1969). No such attack ever has been made on the maximum grain rate levels involved in this case. Consequently, they stand as a measure of the reasonableness of the maximum rate level.

There is nothing novel about the Commission's use of such maximum reasonable rates as a yardstick by which to measure a rate increase proposal. Indeed, this maximum reasonable level of rates was previously relied on by the Commission in approving separate in-transit inspection charges on grain in *Grand Forks Chamber of Commerce* v. *Great Northern Ry. Co.*, 321 I.C.C. 356 (1963), in which the Commission pointed out that such charges, when combined with applicable line-haul rates, were generally lower than previously-established reasonable maxima.[27]

In holding that the Commission lacks the discretion to utilize the previously-determined maximum reasonable level of rates on grain as a yardstick to measure the reasonableness of the new in-transit inspection charge, the district court erroneously imparted to the

[27] *Grand Forks* erroneously was cited by the court below as standing for a contrary proposition. (App. 103).

courts and the Commission some "prior norm" which requires the consideration of cost and revenue factors relating to the thousands of line-haul rates involved. But the simple fact is that no such "prior norm" exists, and the cases relied upon by the district court do not support its theory.

The lower court placed principal reliance on this Court's decision in *Secretary of Agriculture* v. *United States*, 347 U.S. 645. But we submit that it has wholly misread that decision. *Secretary of Agriculture* did not, as the lower court apparently believed, impose any iron-clad "norm" requiring that cost and revenue data as to the line-haul rate be re-evaluated whenever a separate charge for an accessorial service previously included in the line-haul rate is proposed. Rather, *Secretary of Agriculture* requires only that the Commission either (1) follow its "prevailing rule" of "examining the sufficiency of the line-haul rate" before approving such a separate charge or (2) explain its reason for approving the charge without requiring such a showing. Here the Commission *did* in fact examine the line-haul rates and concluded that the railroads had proved that such rates, when combined with the new separate charges for in-transit inspection, would not exceed reasonable maxima. It further explained its reason for concluding that cost data as to thousands of line-haul rates were not, in the unique circumstances of this case (including the car supply problem previously discussed), necessary to a determination of the reasonableness of the line-haul rates plus the inspection charges.

The essential fallacy of the lower court's decision is

its assumption that the reasonableness of a rate can be measured only by detailed cost evidence as to each individual rate involved. But the Commission's role in evaluating the reasonableness of a rate proposal is not that mechanical or mathematical; examination of relevant cost evidence is not the only means available to the Commission in assessing the reasonableness of a rate proposal. For example, it has long been established that a comparison of a proposed rate with other existing rates may be an appropriate means of evaluating the reasonableness of the proposal. See, *e.g.*, *Chamber of Commerce of Fargo, N.D.* v. *United States*, 276 F. Supp. 301, 307 (D.N.D.); *Northwestern Steel & Wire Co.* v. *Pennsylvania R. Co.*, 305 I.C.C. 462, 464 (1958). As the Commission pointed out in *Seaboard Air Line Co.* v. *Southern Ry.*, 329 I.C.C. 17, 27-28 (1966):

> * * * [C]ost data are not the only basis for a determination of the reasonableness of the assailed rates. While it is true that in absence of other probative evidence cost data may be the crucial factor, our conclusion here as to the reasonableness of the assailed rates is based on broader criteria. (citation omitted). The words "just and reasonable" are not fixed, unalterable, mathematical terms. The determination of what is a reasonable rate, measured solely by cost data, would seriously limit the exercise of a flexible judgment.

We submit that the Commission's decision here fully comports with this Court's suggestion in *Secretary of Agriculture* that the reasonableness of the line-haul

rate should ordinarily be reevaluated whenever a separate charge is imposed for a service previously included in the line-haul rate. There is no intimation in *Secretary of Agriculture* that this reevaluation must be made on the basis of cost evidence alone. Here the Commission concluded, as discussed in detail *supra* at pp. 31-36, that the reasonableness of the applicable line-haul rates could be measured by a comparison with the previously-established maximum reasonable rates. Since, by the very terms of the tariff, the combination of the line-haul rates plus the separate in-transit inspection charges could never exceed the level of the previously established maximum reasonable line-haul rates, including the in-transit inspection service, the Commission properly concluded that the resulting line-haul rates had been shown to be within the zone of reasonableness. This evaluation clearly comports with the admonition of *Secretary of Agriculture* that the line-haul rate be reexamined, and the standards of that case are fully satisfied.

Moreover, this Court emphasized in *Secretary of Agriculture* that even the reevaluation of the line-haul rate is not an iron-clad requirement. Noting that "the normal course for the Commission in dealing with a situation like the present would have been to reexamine the sufficiency of the line-haul rate", this Court explicitly held that "the Commission was not precluded from following a procedure fairly adapted to the unique circumstances of this case" (347 U.S. at 642). And it added that in "technical and complex matters like these, the Commission necessarily must have wide discretion in formulating appropriate solutions" (*Ibid*).

To the extent that the Commission's evaluation of the line-haul rates on a basis other than cost evidence may represent a departure from the more usual practice, the Commission fully explained its reasons for deeming reliance herein upon such evidence to be unnecessary and impractical.

Unlike the situation in the ordinary rate proposal, the production of cost data for the line-haul rates here involved would be so difficult and time-consuming as to be virtually prohibitive. As the Commission pointed out (App. 10), approximately 489,000 in-transit inspections took place in 1969 in the western district alone. There are literally thousands of line-haul rates applicable on the grain to, from and through those inspection points. And, because of the complexities of the grain rate structure, these rates vary to a large degree. Compare *Board of Trade of Kansas City* v. *United States, supra,* 314 U.S. at 548. A requirement that cost data for these thousands of line-haul rates be produced would, in the Commission's judgment, "effectively preclude [the carriers] from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge" (App. 37).

Contrary to the district court's conclusion, the recognition of these practical difficulties does not in any way result in "an evidentiary rule which is discriminatory per se" (App. 105). Indeed, we would suggest that precisely the opposite is true: a refusal to recognize such practical difficulties, thereby placing the railroads in a position where they were literally unable to produce the evidence required to adjust a particular

category of rates, would be a gross discrimination against carriers operating under such a rate structure. Compare *Interstate Commerce Commission* v. *Inland Waterways Corp., supra* 319 U.S. at 689, in which this Court refused to interpret the statute there involved in such a way as to impose "a practically impossible burden" on the agency.

The remaining cases relied upon by the lower court require no different result. For the most part, those cases merely constitute instances in which the Commission found, on the basis of other facts, that cost evidence was necessary to an evaluation of the line-haul rate. For example, in *Transit Charges—Southern Territory, supra* 332 I.C.C. at 664, which involved a proposed separate charge for transit privileges, the Commission specifically found (in sharp contrast to the instant case) that the combination of the line-haul rates and the separate charges proposed for the service "may well result in rates and charges which exceed reasonable maxima" (332 I.C.C. at 686). In those circumstances, additional evidence as to the reasonableness of the proposal was, quite logically, held to be necessary. Similarly, in *Lumber at New York Harbor,* 256 I.C.C. 463 (1943); and *Terminal Charges at Pacific Coast Ports,* 255 I.C.C. 673 (1943), the Commission found that no satisfactory showing—on the basis of costs or any other basis—had been made as to the reasonableness of the resulting line-haul rates there involved, so that the justness and reasonableness of the proposal had not been established. But there is nothing in those opinions to indicate that the necessary showing could be met by cost evidence alone.

Finally, the lower court inexplicably relied upon *GrandForks Chamber of Commerce* v. *Great Northern Railway, supra,* 321 I.C.C. at 356 (App. 103). But that case is actually strong precedent for the Commission's decision here. There, as here, the carriers published a separate in-transit inspection charge on grain. There, as here, the cost of the service was shown to correspond to the proposed separate charge. In finding the proposed charge to be just and reasonable, the Commission relied—just as it did here—on the fact that the combination of the separate charge and the line-haul rate generally was less than the maximum reasonable rates previously determined in the Docket 17000, Part 7 investigation, as raised by subsequent general increases (321 I.C.C. at 359). That case thus in no way indicates any contrary "prior norm", but rather an application of the same principle applied in the instant case.

In sum, the Commission acted well within its discretion in concluding that cost and revenue data relating to thousands of individual line-haul rates on grain were not necessary to a determination of the justness and reasonableness of the proposed in-transit inspection charges. The inspection charges were shown to correspond to the costs of providing the service, and such charges, together with the line-haul rates, would not exceed levels previously judged reasonable in prior Commission proceedings. Moreover, unlike ordinary rate increase proposals, the entire purpose of the inspection charges was not to collect additional compensation but rather to discourage use of a service which was tying up thousands of freight cars needed for transportation. In these circumstances, and in view

of the Commission's findings as a whole, to require that implementation of the proposal be delayed until exhaustive studies, involving thousands of individual rates, could be made and specific costs analyzed would be contrary to sound transportation policy and inimical to the best interest of shippers as well as carriers, throughout the Nation.

II.

THE COURT BELOW EXCEEDED ITS POWERS BY SUSPENDING THE IN-TRANSIT CHARGES AND RENDERING THEM INEFFECTIVE UNTIL FURTHER ORDER OF THE COURT

In addition to remanding the case to the Commission for further findings on the merits of the proposed in-transit charges, the court below further ordered that the charges themselves "are suspended and shall be ineffective until and unless otherwise ordered by this Court." (App. 106). Even if the lower court properly remanded the case—which we deny—that portion of its judgment suspending the rates was plainly in excess of its statutory authority.

By itself purporting to suspend the in-transit charges until further order of the court, the court below acted in contravention of this Court's decision in *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658. This Court held in *Arrow* that the exclusive power to suspend rates under section 15(7) of the Interstate Commerce Act rests in the Commission and that the courts lack power to suspend rates or to extend Commission suspensions beyond the maximum period provided by the statute. Construing section 15(7), the

Court held that Congress, by fixing the period in which the Commission might suspend rates, and providing that the rates "shall go into effect at the end of such period", must have intended to foreclose judicial power to extend the period (372 U.S. at 664). As the Court stated:

> We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief. [372 U.S. at 667]

As noted in *Arrow*, the Commission's power to suspend was first conferred by the Mann-Elkins Act of 1910,[28] and was a direct outgrowth of the legislative and judicial experience immediately preceding that legislation. When in 1906 the Commission was empowered by the Hepburn Act[29] to determine the validity of proposed rates, but without any coincident power of suspension, injunctions were sought in the courts against the application of such new rates, with diverse, confusing, and inequitable results. Many courts were in considerable doubt as to their power, and, as the Commission itself noted at the time, economic hardship was frequently visited on those shippers which were not able to secure injunctive relief—relief which at times, could even depend on the ability of an aggrieved party to file a bond (372 U.S. at 663-664). Moreover, different

[28] 36 Stat. 539, 552.

[29] 34 Stat. 584, 589.

courts at times reached different conclusions with regard to the same rate change, resulting in disparity of treatment as between different shippers, carriers, and sections of the country (372 U.S. at 664).

The solution adopted by Congress represented a compromise between conflicting interests. The basic right to initiate rate changes was left with the carrier, and the Commission was empowered to declare such rates unlawful only after full investigation. But to protect shippers and others who might otherwise be required to pay a rate later found unlawful, the Commission was granted the power to suspend the rate proposal pending its investigation. For the protection of the carriers, however—who would be deprived of the revenues and other benefits to be derived from the rate change during the suspension period—the length of time during which such suspensions might remain in effect was explicitly limited;[30] and in 1920 a provision was added to specify that the rate "shall go into effect at the end of such period" whether or not the investigation had been concluded. Recognizing that this might result in a shipper's having to pay rates which were put into effect at the end of the suspension period but later found unlawful, Congress in 1920 added a further provision (which exists to this day) authorizing the Commission to order carriers to keep

[30] The Mann-Elkins Act of 1910 authorized the Commission to suspend rates for an initial period not exceeding 120 days, with a discretionary power to extend that period for an additional six months (36 Stat. 552). In 1920, the Esch-Cummins Act cut the authorized period of extension to 30 days (41 Stat. 486-487). In 1927, the time period was altered to its present form, authorizing suspension for a maximum of seven months (44 Stat. 1447-1448).

an accounting of charges so collected and to make refunds if the rates are ultimately found unlawful (41 Stat. 484, 486-87; see 372 U.S. at 664-65).

Analyzing this legislative history, this Court in *Arrow* concluded that it was the intention of Congress "to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injuctive relief" (372 U.S. at 667). To believe otherwise, as the Court stated, would mean that Congress ". . . intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head" (372 U.S. at 664). This Court further adverted to the "close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates," and concluded that this "relationship suggests it would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive" (372 U.S. at 668).

*Arrow,* of course, differs factually from the instant case in that there the judicial suspension of rates was sought while the case was still pending before the Commission in the first instance, while here the suspension has been imposed while the case is pending before the Commission on remand. But, as Judge Friendly recognized in *National Small Shipments Traffic Conference* v. *United States,* 321 F. Supp. 500 (S.D.N.Y.), this is not a material difference such as would negate application of the *Arrow* rule. In a well-reasoned decision directly in conflict with the lower court's decision

here, the district court in *National Small Shipments*,[31] after reviewing a final Commission decision approving certain rates and holding the Commission's order invalid, considered the question of its power under *Arrow* to order the rates suspended pending reconsideration by the Commission, and concluded (321 F. Supp. at 515):

> The tariff has already been suspended for the full period allowed by Section 216(g), indeed even longer as a result of the carriers' agreement; and the rates were placed in effect as a result of the carriers' action, not the Commission's. If the Commission had simply failed to conclude its investigation before the end of the suspension period and the carriers had placed Tariff 500 in effect, Arrow Transp. Co. v. Southern Ry., 327 U.S. 658 (1963), would clearly preclude us from enjoining application of the rates. We see no relevant difference with respect to our power to do this in the fact that the Commission here concluded its labors and found, although without adequate justification in our view, that the carriers had sustained their burden of showing the rates to be just and reasonable. In neither situation can we direct the Commission to reinstitute a suspension which had already continued as long as Congress allows.

Appellees now suggest that the judicial suspension of rates was not even at issue in *Small Shipments*,

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[31] The *Small Shipments* case involved § 216(g) of the Act (49 U.S.C. 316(g)), which applies to motor carriers. The statutory suspension language of § 216(g) is the same as that of § 15(7).

plaintiffs therein having requested only an injunction against the Commission's order (Wichita Motion, p. 12). But, as Judge Friendly noted in that decision (321 F. Supp. at 515), an injunction against the rates could well have been apprehended by such a request for relief, and his opinion represents a complete disposition of the issues present in the case.[32] *Cantlay & Tanzola, Inc.* v. *United States,* 115 F. Supp. 72 (S.D. Calif.), is not to the contrary, since the issue here, later decided by *Arrow* and *Small Shipments,* was intentionally not disposed of in that case.

The basic compatibility of the *Small Shipments* decision with the underlying rationale of *Arrow* is evident. The impropriety of judicial suspension is no less apparent upon remand of the case than at any other time in the rate-making process; the fact that the lawfulness of the rate proposal is again before the Commission, as the result of a reversal of its original decision by the reviewing court, simply has no bearing on the issue of whether judicial suspensions should be permitted. *Small Ship-*

[32] Appellees suggest further that the Commission in *Small Shipments* exercised a suspension power in excess of the statutory period by directing cancellation of the rates after the court's remand (Wichita Motion, p. 14). This is inaccurate. The carriers there were given a choice between cancellation of the rates and the institution of a new proceeding, or the acceptance of an accounting and refund provision pending further hearings in the existing proceeding, and they chose the former.

Appellees also contend that the court's decision in *Small Shipments* is distinguishable from the case at bar because there the court's action was "inimical to a remand" (Wichita Motion, p. 12). This also is inaccurate. As the Court held in *Small Shipments,* (321 F. Supp. at 316), "We therefore vacate the Commission's determination that the rates and charges under Tariff 500 are just and reasonable and direct it to take further proceedings in a manner not inconsistent with this opinion."

*ments, supra.* In either event, no final decision on the justness and reasonableness of the proposed rates has yet been reached, and the adverse effects of judicial suspension mentioned in *Arrow* can result in the one stage of the proceedings no less than in the other.

This Court in *Arrow* noted the disparity of treatment as between different shippers, carriers, or sections of the country that could result from the judicial exercise of a suspension power while the proceeding was pending before the Commission in the first instance. The same problem exists if that suspension power is exercised in connection with a remand of the proceeding following judicial review. Under the Urgent Deficiencies Act,[33] which governs review of Commission decisions, any number of suits may be brought in district courts throughout the nation, seeking review of the same Commission decision. And the courts reviewing such decision may, of course, reach differing results. In the event a Commission decision is sustained by one court and reversed by another, the exercise of the suspension power by the reversing court would either result in disparate treatment of different shippers (if the suspension were limited in scope)[34] or, if unlimited, in the

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[33] 28 U.S.C. 2284, 2321-2325; 62 Stat. 968-970.

[34] Compare *United States* v. *Florida East Coast Railway*, No. 70-279, Oct. Term, 1972, now pending before this Court, in which a Commission decision establishing incentive per diem charges (as to which the suspension provisions of the statute are inapplicable) was sustained by a district court in New York (318 F. Supp. 490) and reversed by a district court in Florida (322 F. Supp. 725). The result is that during the pendency of the Government's appeal to this Court, application of the incentive per diem charges has been enjoined as to two railroads (the Florida East Coast and the Sea-

implicit negation by one court of the other court's decision.

Moreover, even as primary jurisdiction was a factor in *Arrow*, so it was in *Small Shipments* and so it is here.[35] The district court did not purport itself to finally determine the justness and reasonableness of the proposed changes; instead it remanded this case to the Commission. It is clear that any such future decision would be an exercise of administrative discretion within the special competence of the Commission to make. *Cf. Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134. There is no perceivable difference between an agency's primary jurisdiction after remand and that exercised initially; the "nexus" between the suspension power and primary jurisdiction is the same in either situation.

The sweeping power of judicial suspension asserted here by appellees finds no support in the available authorities. Relying on a footnote in *Arrow* (372 U.S. at 671, n.22), in which this Court stated that it takes no position on the propriety of "decisions recognizing a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action . . .", appellees claim support for a judicial suspension *after* review is completed, pending remand to the agency, and even until further order of the district court itself (USDA Motion, p. 10;

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board Coast Line) but is in effect as to all other railroads in the Nation.

[35] Appellee Secretary of Agriculture seems to recognize the relevance of the primary jurisdiction doctrine; see USDA Motion to Affirm, pp. 10-11.

Wichita Motion, pp. 9-10). No such conclusion can fairly be drawn in view of the underlying bases of the *Arrow* decision.[36]

The pernicious practical effects of judicial suspension are clearly illustrated by this very case. Notwithstanding the Commission's unchallenged findings that in-transit inspection charges are an effective device to increase car supply and to accelerate the movement of grain—findings borne out by actual experience under the rate—the district court chose to suspend these charges. Without any notice or explanation, without even any request for such action from any party, the court in one short sentence took a measure with enormous transportation significance. This is precisely the type of action which this Court in *Arrow* sought to prevent.

It is settled that ". . . the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20. See also *United States* v. *Saskatchewan Minerals*, 385 U.S. 94, 95. By suspending the charges, not only pending reconsideration but even until further clearance from the court itself, the court below clearly exceeded its mandate.

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[36] *Ad Hoc Comm. on Consumer Protection* v. *United States*, 313 F. Supp. 119, 126 (D. D.C.), also relied on by appellees (Wichita Motion, pp. 10-11), is inapposite for the same reason.

## CONCLUSION

The judgment of the district court should be reversed, and the case remanded with directions to sustain the Commission's orders under review.

Respectfully submitted,

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